80-581

No. 80-_____

Supreme Court, U. S.
FILED
OCT 10 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

—against—

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, MARY CRAIG, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and DAVID M. LEWIS, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

JURISDICTIONAL STATEMENT

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STATE OF MONTANA, *et al.*,
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JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

In 1975, at a time of national energy crisis, Montana imposed a severance tax of 30% on coal mined in the state, including coal from federal reserves which comprise three-quarters of the total. This new tax was imposed on top of many other taxes and sources of revenue already available to Montana. This action, commenced by eleven midwestern and southwestern electric utility companies which use coal mined in Montana and by their Montana coal suppliers, seeks to establish that the tax is excessive in amount and thereby violates the Commerce and Supremacy Clauses of the

United States Constitution. As the Montana Supreme Court has said (Opinion 15; Apdx. 17a):*

> No more important case on the power of states to levy taxes can be imagined than is presented here.

We agree.

In particular, the following questions are presented:

1. Did the state court err in holding, in the face of a challenge under the Commerce Clause, that the State of Montana may, as a matter of law, tax the severance of coal destined for immediate export to other states without limit as to amount and without regard to the substantial adverse effect the tax has on interstate commerce?

2. Did the state court err in holding, as a matter of law, that the Montana Coal Severance Tax does not violate the Commerce Clause of the United States Constitution because a tax imposed for the general support of government is, as a matter of law and without any limit as to amount, "fairly related" to the services and protection provided by the state to the taxpayer?

3. Did the state court err in rejecting, out of hand, plaintiffs' claim that the Montana Coal Severance Tax discriminates against interstate commerce notwithstanding the fact that the tax was manifestly "tailored" to fall on such commerce?

4. Did the state court err in rejecting plaintiffs' claim that the Montana Coal Severance Tax violates the

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* "Opinion" refers to the decision by the Supreme Court of Montana. "Apdx." refers to the Appendix to this Jurisdictional Statement.

Supremacy Clause of the United States Constitution, despite plaintiffs' allegation and proffer of proof that the tax substantially frustrates the effectiveness of federal statutes intended to encourage the production and use of coal in general, and particularly western coal, and despite defendants' admission, for purposes of the present proceeding, of the truth of the underlying facts?

5. Did the state court err in denying plaintiffs an opportunity to prove at trial their claim that the Montana Coal Severance Tax violates the Supremacy Clause of the United States Constitution, despite plaintiffs' allegation and proffer of proof that the tax substantially frustrates the national policy embodied in the Mineral Lands Leasing Act of 1920 which reserved federally-owned coal to the federal government and allocated the revenues, as between the states and the federal government, in a fixed proportion?

PARTIES TO THE PROCEEDINGS BELOW

All of the parties appearing in the Supreme Court of the State of Montana are listed in the caption.

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DECISION OF THE COURT BELOW

The decision of the Supreme Court of the State of Montana, dated July 17, 1980, is not yet reported. It is reprinted in the Appendix at pages 1a-40a.

JURISDICTIONAL BASIS OF THIS APPEAL

This is an appeal from a final judgment entered pursuant to the decision of the Supreme Court of the State of Montana holding that a state tax statute is valid. In their Complaints, and throughout the proceedings in the state courts, plaintiffs drew into question the validity of that statute on the ground of its repugnance to the Constitution and laws of the United States. Judgment was deemed to have been entered on July 17, 1980, when the decision of the court below was docketed by the Clerk of the Supreme Court of the State of Montana. Notices of Appeal were filed with the Clerk of that court on October 2 and 6, 1980. This Court has jurisdiction of this appeal by virtue of 28 U.S.C. § 1257 (2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case raises questions concerning the validity of the Montana Coal Severance Tax, Montana Code Annotated §§ 15-35-101 *et seq.*, under the Commerce and Supremacy Clauses of the United States Constitution, art. 1, § 8, cl. 3 and art. VI, cl. 2, respectively, and many federal statutes encouraging, mandating or regulating the use of coal.[1] The text of these authorities, insofar as presently pertinent, is set out in the Appendix.

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1 Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676, as amended, 42 U.S.C. § 1857 *et seq.*; Emergency Petroleum Allocation

STATEMENT OF THE CASE

This case presents issues as old as the Republic and as timely as tomorrow's headlines. It involves an attempt by one state, having an abundant supply of a vital natural resource—here low sulphur coal—to exact a tribute from the inhabitants of her energy-poor sister states. Montana's policy has been described as one of "OPEC-like revenue maximization", having no relationship to any legitimate needs of the State.[2] As noted by one of its principal sponsors, "[i]n the energy crunch today, Montanans should remember that the Arabs have the oil but Montana has the coal. . . ."[3]

Montana does not own any significant portion of this coal. Indeed, the record establishes that three-quarters of the coal in Montana belongs to the federal government. What Montana here seeks to do is to force the rest of the country to pay Montana an excessive tax for the use of a

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Act of 1973, Pub. L. No. 93-159, 87 Stat. 627; Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871; Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233; Energy Research and Development Administration Act, Pub. L. No. 95-39, 91 Stat. 180; Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246; Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083; Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 95-577, 88 Stat. 1878; Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437; Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350; Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289.

2 Rand Corporation, *Coal Development and Government Regulation in the Northern Great Plains: A Preliminary Report* 148 (August 1976).

3 Representative Ora Halvorson of Kalispell, Montana, Vice Chairman of the Montana House Taxation Committee, quoted in *The Missoulian*, January 11, 1975.

vital natural resource fortuitously located within its borders. While the tax is a severance tax in form, it is the functional equivalent of an export duty in fact, since virtually all of the coal is destined for interstate shipment under contracts which provide, in effect, that the tax will be passed along to ultimate consumers in other states.

Montana and its courts have taken the position that the Constitution imposes no limits on the power of that state to impose such taxes. According to Montana, a tax equal to 100%, or even 1,000%, of the value of the coal may be imposed, and neither the Commerce Clause nor the Supremacy Clause can be invoked to prevent it.

This case thus presents fundamental questions of the state's power to impose taxes which cry for decision by this Court. If ultimately upheld, Montana's Coal Severance Tax foreshadows a trend in state taxation of energy resources which can only lead to the Balkanization of this nation in the same way that OPEC's efforts have fragmented the world economy. In the end, the far-reaching question presented by this appeal is whether the United States Constitution limits the power of energy-rich states to exact virtually unlimited tribute in the form of taxes from the rest of the country, notwithstanding the lack of need for such taxes and the adverse effects such taxes may have on interstate commerce and on national policies designed to meet the energy needs of the nation.

Statement of Facts

In 1975, in response to increased demand for low sulphur coal generated largely by the Clean Air Act of 1970 and in the aftermath of the 1973 Arab oil embargo, Montana increased its severance tax on coal to

unprecedented levels. As a result, substantially all of the coal now mined in the state is taxed at 30% of value.[4] This is, by far, the highest rate in the nation. Coal taxed at the rate of 34 cents per ton prior to the 1975 amendment is now typically taxed at the rate of $2.08 per ton, with some taxpayers presently paying as much as $4.63 per ton. On a percentage basis, the increases from 1975 to date thus amount to from 500% to 1,250%.

It is clear that the tax has a substantial effect on interstate commerce and was always intended to do so. As the Montana legislature well knew at the time this tax was passed, the great bulk of coal mined in Montana is immediately shipped out of state pursuant to long-term coal purchase agreements which provide that the costs of taxation will be passed along to the consuming utilities. These utilities, in turn, must adjust the price of electricity to their customers to reflect increased fuel costs. In 1979, such out of state shipments aggregated 28 million tons of coal, accounting for at least 90% of the value of Montana's entire production. Plaintiffs paid severance taxes of about $60 million on these shipments. Under the terms of existing contracts, they estimate that the amount payable over the next two decades will reach several billion dollars.

These facts loomed large in the adoption of the tax. While the technical incidence of the tax is on the coal producing plaintiffs in Montana, selection of coal as the object of the extraordinary tax permitted the Montana legislature to export the practical effect of the tax to

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4 Value is defined as the "contract sales price," *i.e.*, the price of coal when extracted and prepared for shipment f.o.b. mine, less production taxes. § 15-35-102, M.C.A.

consumers in other states who are unable to vote in Montana. For reasons such as these, the tax has enjoyed unparalleled popularity within Montana. Since its passage, there has been no substantial opposition to it.

It is equally clear that the tax may have a substantial adverse effect on the many efforts of Congress to shift this nation's energy reliance away from foreign petroleum products and toward increased reliance upon coal. The vast resources of coal found in the western United States—much of it owned by the federal government—are a cornerstone of these vital policies. If permitted to do so, plaintiffs would be prepared to show at trial that federal statutes have so encouraged the use of such coal, particularly for electric utility purposes, as to virtually mandate its use. The excessive costs imposed by this tax manifestly tend to frustrate the central purpose of those statutes.[5]

Montana finds itself able to exact taxes of this magnitude because of its unique position with respect to coal. One-quarter of our entire national reserves, and over one-half of our national reserves of low sulphur coal, are located in Montana. Montana and Wyoming together contain 40% of this nation's coal. But this is not to say that the coal "belongs" to Montana and Wyoming or comprises their exclusive "birthright". To the contrary, fully three-quarters of these reserves have historically belonged to the federal government and still belong to it.

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5 In this connection, the State of Texas appeared as *amicus* in the Court below in favor of plaintiffs. Its representations to this effect are compelling.

The principal justification of the tax profferred by defendants is that the tax revenues are necessary to meet the impact costs of coal mining. This is simply not true. Unhindered by the sorts of pressures which typically restrain excessive taxes, the Montana legislature set the rate of the tax with an eye toward revenue-maximization, in the mold of the OPEC nations. In fact, legislative findings preceding the Montana statute clearly emphasize the "economic rents"[6] to be obtained from the coal mining activity, rather than the needs of the state. *See* § 15-35-101(e), M.C.A.; Apdx. 62a-63a. Because the case was disposed of below on a motion to dismiss, plaintiffs have never had an opportunity to make a full factual record. Certain facts nevertheless show that the disparity between needs and revenues is great.

1. Even without a severance tax, the costs of coal mining which impact on the State of Montana would be covered by other taxes[7] and by federal revenue programs which predated the severance tax.[8] Indeed, Governor Judge of Montana has testified that the federal revenues

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6 The term "economic rents" is generally accepted to mean the difference between the costs of production, including an acceptable profit, and the market price of a commodity.

7 The State of Montana and its local subdivisions impose a number of taxes on the mining of coal. For example, a resource indemnity trust tax (15-38-104, M.C.A.); a gross proceeds tax (15-6-132, M.C.A.); a property tax on mining equipment (15-6-138(b), M.C.A.); and a corporate license tax (15-31-101 *et seq.*, M.C.A.).

8 As noted, roughly 75% of the coal in Montana is actually owned by the federal government. Under the Mineral Lands Leasing Act of 1920, as amended, Montana is entitled to a direct rebate of 50% of all federal royalties on mineral leases within its borders; additionally, the federal government must use an additional 40% of such royalty revenues on reclamation projects in the affected states. 30 U.S.C. §191.

alone are now sufficient to cover all of the state's impact costs.[9] If any further confirmation of this is necessary, it need only be noted that since December 31, 1979, fully 50% of the entire coal tax revenues have been deposited into a constitutional trust fund which may not be used except upon a three-quarters vote of both houses of future legislatures. Mont. Const. art. IX, § 5.

2. Experience now shows that legitimate needs have already been met. This is confirmed by studies done by the state, itself,[10] and by the plaintiffs here. Moreover, property tax rates in affected communities have dropped, not risen, since the onset of large-scale coal mining, and the state, itself, has adopted general tax relief measures for its own citizens which were made possible because of excessive coal tax revenues.[11]

In fact, while much has been made in public discussions of the need for public funds for "boom-towns," reclamation and other legitimate costs, defendants have admitted for purposes of a motion to dismiss that the tax is not fairly related to the services and protections provided by the state. (Complaint, ¶ 26; Apdx. 55a). In support of this allegation, plaintiffs expected to show that the legitimate local impact costs—for schools, roads, police, fire and health protection, and

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9 *Surface Mining Control and Reclamation Act of 1977: Hearings on S.7 Before the Senate Subcommittee on Public Lands and Resources of the Senate Committee on Energy and Natural Resources*, 95th Cong., 1st Sess. 629 (1977).

10 T.O. Cohea, *Coal Board Grants* 15 (January 11, 1978); Robinson, Office of the Montana Legislative Fiscal Analyst, *Coal Impact and Coal Board Grants* 25-26 (September 20, 1977).

11 *E.g.*, 1979 Mont. Laws, ch. 698, amending §§ 15-30-112, 15-30-114, 15-30-122, and 15-30-142, M.C.A.

environmental protection and the like—might amount to approximately 2¢ per ton, compared to present average revenues of Severance Tax alone of over $2.00 per ton.

In sum, if they had not been precluded from doing so, plaintiffs would have introduced evidence at trial which would have demonstrated that revenues expected from this tax were grossly disproportionate to the services and protections provided by the state, however those services and protections may be measured.

The Proceedings Below

In their Complaints, filed in June, 1978, in the Montana District Court for the First Judicial District, Lewis and Clark County, plaintiffs sought a refund of over $5.4 million in taxes paid under protest, a declaration that the tax was invalid under the Commerce and Supremacy Clauses of the United States Constitution, and an injunction against its further collection. A copy of the initial Complaint is reprinted in the Appendix at pages 45a to 61a.[12]

The defendants are the state, itself, and various public officials who are responsible for collection or enforcement of the tax. Defendants moved to dismiss all of the claims for failure to state claims upon which relief could be granted. Without any factual record before it, the trial court granted defendants' motion.

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12 In each quarter since that time, plaintiffs have filed additional Complaints seeking a refund of successive quarterly tax payments. Additionally, Western Energy Company has filed separate Complaints. In the aggregate, the total amount now in issue exceeds $120 million.

On appeal, the Montana Supreme Court passed on these claims as follows:

1. In Count One of their Complaint, plaintiffs asserted that the Coal Severance Tax substantially affects interstate commerce in coal (Complaint, ¶¶ 10, 22; Apdx. 49a, 54a) and that it constitutes an undue burden on commerce in that it (i) is not fairly related to services and protection provided by the state (Complaint, ¶ 26; Apdx. 55a) and (ii) in fact, singles out an interstate activity for tax and thereby discriminates against interstate commerce (Complaint, ¶ 27; Apdx. 55a). *See, e.g., Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977).

The Montana Supreme Court rejected these contentions at the threshold, finding "that the severance of coal here is a taxable event that precedes entry into interstate commerce" and is "not an interstate activity" and that, in such circumstances, the Commerce Clause imposes no limit on the power of the states to tax. (Opinion 15; Apdx. 18a). To arrive at this conclusion, it seized upon a series of decisions in this Court—all more than 50 years old—discussing the power of the states to tax the extraction of natural resources and related activities, particularly relying on *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922). Citing those cases, the court below argued that the Commerce Clause imposes no limit on the power of the state to tax the severance of natural resources, regardless of the impact the tax might have on the interstate commerce in that commodity.

The principal legal question presented here is whether *Heisler* and the other early cases may properly be used in modern times to immunize a state severance tax from scrutiny under the Commerce Clause.

In an alternative holding, the Montana Supreme Court also found that the Montana tax meets the modern Commerce Clause tests, if they apply. In particular, it construed the "fairly-related" prong of the four prong test set forth in *Complete Auto Transit, Inc.* v. *Brady, supra*, in a way which would permit any state tax to meet that test as a matter of law, holding that (Opinion 19; Apdx. 22a-23a):

> Taxes as here imposed for the general support of the government are fairly related to that purpose by the mere fact that a government is thereby maintained.

It further held (*id.*):

> It is only when the taxpayer has an insufficient nexus to the taxing state, or the tax is disproportionate to the incidents of commerce being taxed, that the fair-relation test applies.

2. In Count Two, plaintiffs asserted that the Coal Severance Tax substantially frustrates national policies reflected in a variety of federal statutes intended to encourage the use of coal, and particularly western low-sulphur coal, to meet national energy requirements. (Complaint, ¶¶ 30-32; Apdx. 55a-56a). The decision of the Montana Supreme Court rejected these contentions without permitting plaintiffs the opportunity to prove them. The court below ignored the precise holdings of this Court to the contrary, and required that as a prerequisite to finding preemption there must be a showing that "Congress *intended* to nullify other national, state, local or individual policies . . . ." (Opinion 28; Apdx. 33a). (Emphasis supplied).

3. In Count Three, plaintiffs asserted that the Coal Severance Tax also substantially frustrates a national

policy reflected in the Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437, as from time to time amended. (Complaint, ¶¶ 34-44; Apdx. 56a-59a). Under that Act, Congress determined to retain mineral resources in the western states for the people of the entire nation, subject to payment of a share of royalties to the states. (Complaint, ¶ 38; Apdx. 57a). As a result, some three-quarters of the coal reserves in Montana belong to the federal government. The essence of the Act is a compromise which channels the revenues from this mineral wealth to the federal government, in the first instance, subject to later division with the states in a fixed proportion.

Notwithstanding the federal policy set forth in this basic compromise—on the existence of which the Montana Supreme Court did not rule—it found that a proviso in the Act continuing "any rights which [the state] may have" to tax constituted "a clear expression of federal policy" which permitted state taxation, without regard to the effect the tax might have on the compromise itself. (Opinion 33; Apdx. 38a-39a). Thus, the net effect of the Montana Coal Severance Tax is to appropriate the "economic rents" from such reserves directly to the state, before they can be secured by the federal government in accordance with the Act. (Complaint, ¶ 42; Apdx. 59a).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. ANY RULE WHICH AUTHORIZES ENERGY-RICH STATES TO IMPOSE UNLIMITED TAXES ON ENERGY RESOURCES DESTINED FOR OTHER STATES CAN ONLY LEAD TO A BALKANIZATION OF THE NATION CONTRARY TO THE FUNDAMENTAL PURPOSE OF THE COMMERCE CLAUSE.

The result announced by the court below foreshadows grave practical consequences for this nation in that it can only lead to serious division between those states which have access to energy resources and those which do not. In essence, the Montana Supreme Court held that the Commerce Clause imposes no limit whatsoever on the power of the individual states to extract taxes based on the severance of energy resources destined for export to other states. This position came into vivid focus when defendants conceded that it would make no difference to their analysis of the case if the tax were raised to 1,000% or 2,000%.[13] This contention was tacitly accepted by the court below and inevitably follows from its decision. Thus, in its view, the only limitation on the rate of a state's tax substantially affecting commerce is that set by the state's legislature. (Opinion 18; Apdx. 22a). This is a dangerous view.

The availability of energy resources, and the price which they command, is one of the most divisive issues of our time. Armed with unfettered power and freed from constitutional restraint, the self-interests of energy-

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13 Counsel for defendants also argued that the Commerce Clause did not come into play until a state's tax imposed a *de facto* embargo against exportation of coal or actually brought the commerce in coal to a complete halt at the state's borders.

rich states must come into conflict with those which lack such resources and with the national interest in energy issues. Any constitutional rule which permits states to adopt "OPEC-like revenue maximization" policies clearly cuts across the balance between state and federal power lying at the heart of the Commerce Clause and exposes the nation to Balkanization. Where a state tax approaches a tax on exports—as this tax does[14]—it offends the basic premise that this nation constitutes a nationwide free trade area in which one state is not permitted to throw up undue trade barriers at the expense of its sister states. *See, e.g., Hood & Sons* v. *Du Mond*, 336 U.S. 525, 538-39 (1949). In similar circumstances, involving taxes which are functionally indistinguishable from severance taxes, this Court has not hesitated to act. *E.g., Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 374 U.S. 157 (1954). No functional distinction exists between severance taxes and other taxes such as the foregoing and, accordingly, no valid policy justifies the rule adopted here. *See* W. Hellerstein, *Constitutional Constraints on State and Local Taxation of Energy Resources*, 31 Nat. Tax J. 245, 248 (1979) (hereinafter cited as "Hellerstein").

Montana's tax is a prime example of the abuses which may flow from any rule which leaves the states with unfettered power to tax. It was designed to shift billions of dollars to Montana directly from the citizens of other states by the end of the century and to use a substantial

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14 *See* Developments in the Law, *Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 970-71 (1962); Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L.J. 219, 232-33 (1957); Posner, *Economic Analysis of Law* 510 (2d ed. 1977).

part of those billions to create a multi-billion trust fund for future Montana citizens. To date, it has succeeded in that intent. The potential for dissention and retaliation is manifest.

Quite apart from the facts of this particular case, there is a serious danger that other states will follow Montana's lead if the result below is permitted to stand. Montana is the frontrunner in adopting excessive severance taxes on coal, but many other states are mindful of this proceeding and will surely measure their taxing powers against the ultimate result here. Several states have come to Montana's defense, while many other states have publicly manifested opposition to the Montana tax.

The importance of these issues was further underscored when this Court granted a writ of certiorari in *Merrion* v. *Jicarilla Apache Tribe,* 617 F.2d 537 (10th Cir. 1980) (*en banc*), *cert. granted,* 49 U.S.L.W. 3208 (Oct. 6, 1980). That case raises, among other things, issues concerning the effect of the Commerce Clause on the power of Indian Tribes to adopt severance taxes on natural resources. On the pertinent point, the Tenth Circuit sustained the tax on reasoning similar to that of the Montana Supreme Court. *See* 617 F.2d at 545-46. The instant case arises, however, in a context having wider application, since it relates to the power of the states, and with far greater financial consequences.

For these reasons, this case raises substantial questions under the Commerce Clause on which this Court should rule.

II. A STATE TAX ON AN ACTIVITY WHICH "SUBSTANTIALLY AFFECTS" INTERSTATE COMMERCE, BUT IS NOT YET "IN" INTERSTATE COMMERCE, SHOULD BE EXAMINED UNDER THE COMMERCE CLAUSE.

The Montana Supreme Court arrived at its result principally through its construction of a series of cases decided by this Court in the 1920's and 1930's dealing with the Commerce Clause implications of taxation of mineral resources. *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922); *Oliver Iron Co.* v. *Lord*, 262 U.S. 172 (1923); *Hope Gas Co.* v. *Hall*, 274 U.S. 284 (1927). Under those decisions, an activity not "in" commerce was said to be wholly outside the scope of the Commerce Clause.

Those decisions have not been reviewed directly in this Court for over fifty years and, in the words of a leading authority, now present "fertile soil for reconsideration . . . ." (Hellerstein, *supra*, at 254). They are, we submit, utterly inconsistent with constitutional doctrines adopted since that time which clearly recognize the Commerce Clause implications of acts which "substantially affect" interstate commerce whether they are "in" or "out" of such commerce. For this reason as well, the issues raised here are deserving of review by this Court.

The issue here is not, and never has been, whether the states have the power to tax the severance of natural resources to meet legitimate needs. Plaintiffs have consistently recognized that power. They fully recognize that wide latitude must be given to state legislatures to assess those needs and to fix appropriate means to raise revenues. Instead, the issue is whether the state's power is exclusive, absolute and free from any constraint under

the Commerce Clause, notwithstanding the actual or potential effects of the tax on interstate commerce.

Under the broad rationale of older cases—adopted and applied here by the Montana Supreme Court—all Commerce Clause questions could be decided by a "mechanical test" which was expressed most clearly in this Court's decision in *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936). There, the majority derived the following rule from *Heisler*, *Oliver Iron* and other like cases (pages 302-03):

> One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce. *In respect of the former, he is subject only to regulation by the state; in respect of the latter, to regulation only by the federal government.* (Emphasis supplied).

But this has not been the law since 1937.

This case presents a clear choice between the foregoing "mechanical test" and a modern test which requires the courts to examine the practical effect of activities, including state taxes, which "substantially affect" interstate commerce.

The Montana Supreme Court decided the case by applying the older rule, despite the fact that the law concerning the scope of the Commerce Clause has changed entirely in the last forty years. The rationale of *Heisler* and like cases has been altogether undermined

and the results of modern cases are completely irreconcilable with its rationale. *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1 (1937), clearly broke with the *Heisler* test. It held (page 37):

> Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.

Wickard v. *Filburn*, 317 U.S. 111 (1942), underscored the departure from the earlier rule, extending the commerce power to those "activities in*tra*state which so affect interstate commerce . . . as to make regulation of them appropriate. . . ." *Id.* at 127. (Emphasis supplied). It made specific reference to *Heisler* and related cases as "earlier pronouncements" which no longer accurately reflected the law, even in 1942. *Id.* at 127, n. 21.

Since 1937, this Court has consistently held that activities which "substantially affect" interstate commerce raise Commerce Clause considerations of the same type as those activities which are "in" interstate commerce under the older rules. *E.g.*, *McLain* v. *Real Estate Bd. of New Orleans*, 444 U.S. 232, 241-42 (1980); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). This is equally true when the Court has considered the "negative implications" of the Clause—*i.e.*, its restraints on the power of the states—as when it considered its affirmative grant of power to Congress. *E.g.*, *Lewis* v. *BT Investment Managers, Inc.*, 100 Sup. Ct. 2009, 2016-17 (1980); *Philadelphia* v. *New Jersey*, 437 U.S. 617, 622-23 (1978). The claim that a state's tax or regulation only

affects a "local" or intrastate activity no longer serves to immunize it from Commerce Clause scrutiny. *E.g.*, *Nippert* v. *Richmond*, 327 U.S. 416, 424 (1946); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 140 (1970); *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333, 349-50 (1977). *See also Parker* v. *Brown*, 317 U.S. 341, 362 (1943).

The Montana Supreme Court did not dispute—and, in fact, tacitly conceded—that this Court's opinions over the years since 1937 have consistently rejected mechanical tests such as that employed in *Heisler* in favor of Commerce Clause tests looking to the practical "substantial effects" of particular activities on commerce. (Opinion 9-10; Apdx. 11a-12a). It merely held that the rationale of the modern cases had not yet been extended to the precise question of a state's power to tax natural resources and that it did not feel bound by "dicta" in other cases. It offered no express rationale for distinguishing those cases.

Such a distinction cannot be supported in principle. An artificial distinction between matters which are exclusively "federal" and those which are exclusively "local"—the precise distinction on which the court below premised its decision—could readily lead to retaliation of state against state and to a breakdown in the national economy.

For the foregoing reasons, the instant case squarely presents a fundamental question under the Commerce Clause which ought to be determined by this Court.

III. THE RESULT BELOW MISCONSTRUES RECENT DECISIONS OF THIS COURT ON IMPORTANT ISSUES CONCERNING THE CONSTITUTIONAL STANDARDS TO BE APPLIED TO STATE TAXES.

In the past decade, this Court has enunciated a series of principles relating to the power of states to tax activities which are in or affect interstate commerce. This effort has been directed at rationalization of constitutional principles along lines which give predominant weight to the practical effect of taxes, not to labels and artificial distinctions. *See Mobil Oil Corp.* v. *Commissioner of Taxes of Vt.*, 100 S. Ct. 1223, 1234 (1980), and cases cited.

Among other things, this Court has announced a substantive Commerce Clause test of general application to state taxes affecting interstate commerce. *See, e.g., Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). As most recently articulated, that test requires the Court to examine:

> the "practical effect" of the tax to determine whether it " 'is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.' "

Exxon Corp. v. *Wisc. Dep't of Rev.*, 100 S. Ct. 2109, 2122 (1980). The Montana Supreme Court readily assented to the expansion of state powers articulated in *Complete Auto* and like decisions (Opinion 13; Apdx. 15a-16a), but gave short shrift to these corresponding limitations. In addition to rejecting the claim that the Commerce Clause applies to a state severance tax, it also reached conclusions which raise important questions

concerning the appropriate construction of the "fairly related" and "discrimination" prongs of the foregoing Commerce Clause test.

1. The court below held that the "fairly related" branch of the foregoing test may be determined as a matter of law, without any factual inquiry, holding that the test was satisfied simply because Montana provided the benefits of government. (Opinion 19; Apdx. 22a).[15] This holding essentially writes the "fairly related" test out of the law, since every state provides governmental benefits of some type. If the test is to have any meaning at all, it must raise factual issues on which proof should be taken. Cases in this Court make clear that the test is factual. *E.g.*, *Washington Rev. Dep't* v. *Stevedoring Ass'n*, 435 U.S. 734, 750-51 (1978); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 287 (1977). Cases in lower courts so state. *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537, 545 n.4 (10th Cir. 1980) (*en banc*), *cert. granted,* 49 U.S.L.W. 3208 (Oct. 6, 1980). *Budget-Rent-a-Car of Wash.* v. *Multnmah Cty.*, 287 Or. 93, 597 P.2d 1232, 1239 (1979). The contrary holding of the Supreme Court of Montana raises a serious Commerce Clause question which ought to be examined here.

2. The Montana Supreme Court discarded "the fair relation" test in another way, holding that it did not come into force unless a tax violates another prong of the test as well, *i.e.*, insufficient nexus or faulty apportionment. (Opinion 19; Apdx. 22a). There is no suggestion in the opinions of this Court that the "fair

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15 In doing so, it rejected the reasoning of the trial court, which squarely held that if it reached this question, it "would necessarily have to deny the motion to dismiss and proceed to a factual determination. . . ." (District Court Order, dated July 27, 1979, at 5).

relation'' test does not stand on its own. The contrary holding of the Supreme Court of Montana raises another question which ought to be considered here.

3. The Montana Supreme Court did not expressly pass on plaintiffs' contentions that the tax was adopted because it would shift an extraordinary burden to other states and thereby discriminates against interstate commerce. This claim, too, raises a serious question which ought to be examined here. Hellerstein, *supra*, at 249.

* * * * *

Each of these questions is of importance, not only to clarify the law for the guidance of the lower courts, but also because each construction adopted by the Montana Supreme Court emasculates one of the Commerce Clause tests enunciated by this Court and thus frees the states from any practical constraint under those tests. In each instance, the construction given to the tests by the Montana Supreme Court leaves the state with unfettered power to tax. That is precisely the vice of the tax in issue here.

IV. THE BURDEN OF MONTANA'S SEVERANCE TAX IS "TAILORED" TO FALL ON RESIDENTS OF OTHER STATES AND THEREFORE DESERVES SPECIAL SCRUTINY.

Plaintiffs claim of discrimination is closely tied to another argument made by plaintiffs and rejected by the Montana Supreme Court. The Montana tax was manifestly "tailored'' to fall on interstate commerce and on out-of-state residents. The Montana legislature was fully aware that the burden of this tax would fall principally on non-residents. Towe, *Explanation of Reasons for Montana's Coal Tax* 4 (1976).

As this Court said in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288-89 n.15 (1977):

> Any tailored tax of this sort creates an increased danger of error in apportionment, of discrimination against interstate commerce, and of a lack of relationship to the services provided by the State. See *Freeman* v. *Hewit*, 329 U.S., at 265-266, n. 13 (concurring opinion). *A tailored tax, however accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce.* (Emphasis supplied).

This case brings into sharp focus the danger posed by such taxes, for here the burden of the tax "is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrick* v. *Berwind White Co.*, 309 U.S. 33, 46 n.2 (1940). In such circumstances, courts generally, and this Court in particular, have a special burden to apply rigorous standards of review. *Austin* v. *New Hampshire*, 420 U.S. 656, 662-63 (1975).

V. A STATE TAX WHICH SUBSTANTIALLY FRUSTRATES FEDERAL ENERGY POLICIES SHOULD BE DECLARED INVALID UNDER THE SUPREMACY CLAUSE.

In recent years, Congress has enacted a series of laws intended to implement a national policy designed to encourage the use and production of coal in lieu of oil and natural gas. In some cases, these statutes expressly or practically require electric utilities and certain industrial users to use coal instead of these scarcer fuels. *See, e.g.*, Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289, and other

statutes cited at pages 1-2, *supra*. Although their legislative history makes it clear that these statutes were intended to encourage and foster the greater use of coal, the court below seized upon the fact that these federal laws do not specifically prohibit state severance taxes. The effect of the decision is to permit the Montana legislature to undermine important federal policies by increasing the cost of coal, while Congress is attempting to encourage its use.

The court below arrived at this result by ignoring the many decisions in this Court which establish that "any state legislation which frustrates the full effectiveness of federal law" or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is rendered invalid by the Supremacy Clause. *Perez* v. *Campbell*, 402 U.S. 637, 652 (1971); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Under the decided cases, a finding of substantial frustration may be based on an interference which is not apparent on the face of a statute. Indeed, on many occasions this Court has evaluated the practical effect of state laws on the implementation of federal policies, and has struck them down even though no direct conflict with federal law existed. *E.g.*, *Nash* v. *Florida Industrial Comm'n*, 389 U.S. 235 (1967); *Hill* v. *Florida*, 325 U.S. 538 (1945). *See also Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540-43 (1977).

The effect of the decision below was to deprive plaintiffs of an opportunity to prove their claims. Plaintiffs were prepared to prove the extent to which implementation of the policies expressed in the cited statutes depends on production of coal from Montana and that the tax has already had, and will continue to

have, a substantial adverse effect on that production. Plaintiffs were prepared to proffer expert testimony (based on extensive studies and computations) designed to show (i) that without the tax, production of Montana coal would rise an additional 20 million tons annually by 1990, and (ii) because of the tax, planned mines in Montana have not opened, existing mines are operating below capacity, coal contracts have been cancelled, and new contracts for Montana coal have dropped off precipitously.

The decision below severely restricts the scope of the Supremacy Clause, by limiting the preemptive effect of federal laws to only those instances where a state law specifically and directly conflicts with a provision of a federal statute. This is not, and should not be, the law. In order for our national government to function effectively, it is imperative that the 50 individual states not be permitted to enact separate laws which have the practical effect of frustrating the effectiveness of federal law. Congress is not, and should not be, required to anticipate all of the myriad ways in which states may frustrate the effectiveness of its laws. Given the wide scope of federal legislation today, this would be an impossible task and would render the effectiveness of the Supremacy Clause a virtual nullity.

For the foregoing reasons, the instant case squarely presents fundamental questions under the Supremacy Clause which ought to be determined by this Court.

VI. A STATE TAX WHICH SUBSTANTIALLY FRUSTRATES THE FEDERAL STATUTORY DIVISION OF ROYALTIES FROM FEDERAL COAL DEPOSITS SHOULD BE HELD INVALID UNDER THE SUPREMACY CLAUSE.

The Montana Supreme Court also dismissed Count Three of the Complaint because, in its view, the Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437, did not specifically prohibit states from imposing severance taxes on federally-owned coal. (Opinion 31-33; Apdx. 37a-39a). In doing so, the court clearly overlooked, without discussion, important federal rights which were at the heart of that Act. Under the Act, federal interests in mineral deposits under western lands were retained by the federal government. It was determined that the national government would have the right to lease these mineral deposits and to receive revenues from them, subject to a division of royalties with the states in which the deposits were located. This is the essential compromise set out in the Act, a compromise reached after years of debate in Congress over proper disposition of these mineral rights.

By absorbing—or attempting to absorb—all of the "economic rents" on such coal in Montana, the severance tax will necessarily reduce the royalties and other revenues received by the federal government and thereby substantially frustrate the compromise which lies at the heart of the Act. It is not an answer to the foregoing that the Act recognized the right of states to impose severance taxes, without expressly limiting the amount of permissible taxation, because that proviso did not grant the states an unfettered right to impose severance taxes on federally-owned coal, but only permitted them to "exercise any rights which they may

have . . . ." 30 U.S.C. § 189. No state has ever had a right to tax to the extent that it substantially frustrates the effectiveness of federal law.

For the reasons previously discussed in connection with Count Two of the Complaint, the Montana Supreme Court's decision dismissing Count Three raises fundamental questions under the Supremacy Clause which should be reviewed by this Court.

CONCLUSION

For each of the reasons set forth above, this Court should note probable jurisdiction to review the opinion and judgment of the court below.

Respectfully submitted,

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IN THE

SUPREME COURT
OF THE STATE OF MONTANA

1980

COMMONWEALTH EDISON COMPANY *et al.*,

Plaintiffs and Appellants,

vs.

STATE OF MONTANA *et al.*,

Defendants and Respondents,

and

LAKE SUPERIOR DISTRICT POWER COMPANY, *et al.*,

Plaintiffs and Appellants,

vs.

STATE OF MONTANA *et al.*,

Defendants and Respondents.

Appeal from:
District Court of the First Judicial District,
Hon. Peter G. Meloy, District Court Judge

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Submitted: April 21, 1980
Decided: July 17, 1980

Filed:

Thomas J. Kearney
Clerk

[2] Mr. Justice John C. Sheehy delivered the Opinion of the Court.

This is an appeal from a judgment of the District Court, First Judicial District, Lewis and Clark County, Montana, the Hon. Peter G. Meloy presiding, upholding the validity of Montana's coal severance tax.

Plaintiffs sought a declaratory judgment from the District Court that the tax unconstitutionally burdens interstate commerce, and unconstitutionally frustrates federal policy. Commonwealth Edison Company and its coplaintiffs brought one action for this purpose, and Lake Superior District Power Company and its coplaintiffs brought a second action. Because the issues are the same, the actions were consolidated.

The District Court granted defendants' motions to dismiss the complaints before trial, finding as a matter of law that they did not state claims upon which relief could be granted. Judgment was entered in each case in favor of the defendants and the plaintiffs appealed.

Since each case comes to us on appeal from a judgment of dismissal, we accept the facts which are well-pleaded in the complaints as true. This was the rule before we adopted the Montana Rules of Civil Procedure, *Heisler* v. *Severy* (1945), 117 Mont. 105, 111, 158 P.2d 501, 503, and is the rule now. However, conclusions of law in the pleadings need not be accepted by this Court as binding under a judgment on a motion to dismiss. Allegations of conclusions of law present no issuable facts. *Waite* v. *Standard Accident Insurance Co.* (1957), 132 Mont. 220, 315 P.2d 984. If therefore factual

issues exist which should have been considered by the District Court prior to granting judgment, the judgment [3] must be reversed. Conversely, if as a matter of law, under any view of the alleged facts, plaintiffs cannot prevail, affirmance of the District Court is commanded.

We have fully considered the contentions of plaintiffs on their appeal; we have examined the pleadings, and the grounds of the motion to dismiss; we have looked at the admitted factual matters which plaintiffs allege would invalidate the tax; and we have concluded from the whole record that the Montana Coal Severance Tax in its present form is a lawful exercise of Montana's taxing authority under our State and Federal Constitutions. Accordingly, we affirm the District Court.

Three issues were raised by plaintiffs for our review:

1. Is the coal severance tax impermissible under the Commerce Clause of the United States Constitution?

2. Is the coal severance tax impermissible under the Supremacy Clause of the United States Constitution as frustrating national policies and statutes?

3. Is the coal severance tax impermissible under the Supremacy Clause of the United States Constitution as frustrating national policies contained in the Mineral Lands Leasing Act of 1920?

THE TAX AND ITS HISTORY

In 1975 and 1977, the Montana Legislature amended its coal severance tax schedules, section 84-1314, R.C.M. 1947, now section 15-35-103, MCA. It now contains these provisions:

"15-35-103. *Severance tax—rates imposed—exemptions.* (1) A severance tax is imposed on each ton of coal produced in the state in accordance with the following schedule:[4]

"Heating quality (Btu per pound of coal):	Surface Mining	Underground Mining
"Under 7,000	12 cents or 20% of value	5 cents or 3% of value
"7,000-8,000	22 cents or 30% of value	8 cents or 4% of value
"8,000-9,000	34 cents or 30% of value	10 cents or 4% of value
"Over 9,000	40 cents or 30% of value	12 cents or 4% of value

" 'Value' means the contract sales price.

"(2) The formula which yields the greater amount of tax in a particular case shall be used at each point on this schedule.

"(3) A person is not liable for any severance tax upon 20,000 tons of the coal he produces in a calendar year."

No issue is raised here that there is an unconstitutional difference between the rate of taxes charged for strip-mining of coal and for underground mining of coal.

Prior to 1975, the Montana tax on strip-mined coal ranged from twelve to fourteen cents a ton, depending on BTU content. The 1975 amendment was a response to the meteoric increase in strip-mined coal entrepreneurs in the state in the 1970's. From the 1940's until the mid-1960's activity in coal strip-mining as well as in underground coal mining remained fairly dormant in the

state. The increase in gross tonnage produced since 1971 from strip-mining is demonstrated by the following figures taken from the records of the Montana Department of Revenue, of which we have taken judicial notice:

One Year	*Gross Tons*
1971	6,983,186
1972	8,224,118
1973	10,678,058
1974	14,116,625
1975	22,160,236
1976	26,347,923
1977	27,340,905
1978	26,516,481
1979	32,545,071

[5] In the general election of 1976 the Montana voters amended their state constitution by adding a new Section 5 to Article IX, 1972 Montana Constitution. In essence the constitutional addition provides that from and after December 31, 1979, at least fifty percent of the severance tax collected shall be dedicated to a trust fund, the principal of which is to remain inviolate unless appropriated by a vote of three-fourths of the members of each house of the legislature.

This Court notes in passing our impression that the 1975 coal severance tax provisions, and the 1976 constitutional amendment, were in part responses to the historical experience of Montana with respect to the inadequacy of earlier forms of taxes on mineral production. In 1965, the Hon. James Felt rose in the State House of Representatives to complain that the richest hill on earth (Butte) had paid not a dime in net

proceeds tax the previous year. Some modifications in computation agreed to by the mining company ameliorated that condition in subsequent years. Nevertheless, Montana's experience had shown that its mineral wealth could be exhausted and exported with little left in Montana to make up the loss of its irreplaceable resources. Montana has been painfully educated about the extreme economic jolts that follow when the mine runs out, the oil depletes, or the timber saws come still. We have a good many examples that teach us what happens to our hills when the riches of our Treasure State are spent. For these and other reasons, when strip coal mining was beginning to burgeon, in 1975, the legislature moved to fix a tax that would provide both for the present and the future when the coal deposits were gone.

Since the commencement of the instant actions, the plaintiffs have paid their coal severance taxes under protest. Were the coal severance tax found to be invalid, presently [6] some $87,000,000 and accrued interest in protested taxes should have to be returned by the State to the taxpaying producers, we were informed in oral argument.

EFFECT OF THE COMMERCE CLAUSE

Before we discuss the commerce clause contentions, we look at the relationship of the various plaintiffs to the coal tax which is being attacked. The true taxpayers before us in this case are the *producers* of the coal. The Montana coal severance tax is levied at the time the coal is separated by the producer from the realty in Montana,

and at its value when sold by the producer in Montana. Section 15-35-103, MCA. Thus in this case, only the coal producing plaintiffs are actually paying taxes, they being Decker Coal Company, Peabody Coal Company, Westmoreland Resources, Inc., and Western Energy Company. The remaining plaintiffs are utilities to whom the producers, by contract or indirectly, may have passed on the coal severance tax as a part of the price of Montana coal. To contend that the utility plaintiffs are the true plaintiffs because by contract or indirectly they have assumed the coal severance taxes would seem also to argue that the coal producers have no real issue at stake here. Nevertheless the coal producers have the only vital stake in this case because they and not the utility companies are in fact the taxpayers. It is the producers to whom the protested taxes would be returned should the tax be found unlawful. In deciding this case therefore, we look to the status in Montana of the producing taxpayers to determine whether the coal, at the time it is severed by the producers, is subject to the present Montana state taxation.

The United States Constitution provides in Article I, Section 8, that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The principal contention of the plaintiffs in this case is that the holdings of the United States Supreme Court in *Heisler, Oliver Iron Co.,* and *Hope Gas Co., infra,* no longer have any force. The plaintiffs do not allow that Montana can tax a purely local event such as the severance of coal from a seam or deposit. They insist

that the commerce clause reaches even into the very severance of the coal, and that the only issue for the District Court to have decided here was whether the coal severance tax had impact enough to hamper or obstruct interstate commerce. The plaintiffs concede that the state can levy some tax, perhaps twelve and a half to fifteen percent of the value of the coal. Therefore, by inference, the plaintiffs contend that at some point not specified, between fifteen to thirty percent of the value of the coal, Montana's coal severance tax butts into the lintel of federal impermissibility.

In essence, the plaintiffs' argument under the commerce clause reduces to this: Montana has no inherent right to tax the intrastate severance of coal which may eventually enter interstate commerce except by federal sufferance; such sufferance ceases when the tax can be construed to hamper or obstruct commerce between the states.

The law on state taxation of production of goods, it seems to us, has been settled by the United States Supreme Court since the 1920's. Leading cases on manufacturing (*American Mfg. Co.* v. *St. Louis* (1919), 250 U.S. 459, 39 S.Ct. 522, 63 L.Ed. 1084); producing (*Hope Gas Co.* v. *Hall* (1927), 274 U.S. 284, 47 S.Ct. 639, 71 L.Ed. 1049); and extracting (*Oliver Iron Co.* v. *Lord* (1923), 262 U.S. 172, 43 S.Ct. 526, 67 L.Ed. 929); (*Heisler* v. *Thomas Colliery Co.* [8] (1922), 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237); established a common theme: production of personal property within a state is a local activity which precedes the entry of the property into interstate commerce, and is therefore subject to state regulation and taxation.

Yet we have found no United States Supreme Court case, and none has been cited to us, which implicitly or directly overthrows the rule that the several states have the reserved power to tax intrastate manufacturing, extraction, and production of goods. It is true that some cases have used language which *seems* to assail this reserved power. Notwithstanding, it must be concluded after an analysis of the cases bearing on the subject that the United States Supreme Court continues to recognize the taxing power of the states in these intrastate fields.

The plaintiffs' attack against the coal severance tax under the commerce clause is based upon the premise that the United States Supreme Court has moved away from its holdings in *Hope Gas Co., Oliver Iron Co.,* and *Heisler,* supra. The cases on which plaintiffs rely for this contention may be summarized as follows:

(1) *Labor Board* v. *Jones & Laughlin* (1937), 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, upholding the NLRA against a constitutional attack; *Wickard* v. *Filburn* (1942), 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122, upholding a federal program of acreage allotments for wheat production; *Parker* v. *Brown* (1943), 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, which upheld a California state statute that fixed prices and restricted sales of raisins grown in California but which contains language seeming to reject the mechanical test of *Heisler; Freeman* v. *Hewit* (1946), 329 U.S. 249, 67 S.Ct. [9] 274, 91 L.Ed. 265, holding unconstitutional the application of an Indiana gross income tax act to the sales of securities by brokers in New York; the securities being assets of an Indiana estate, and incidentally, applying the commerce

clause to intangibles as well as to tangibles; *Nippert* v. *Richmond* (1946), 327 U.S. 416, 66 S.Ct. 586, 90 L.Ed. 760, striking down a municipal tax on solicitors in Richmond, Virginia; *Pike* v. *Bruce Church, Inc.* (1970), 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174, striking down an Arizona state regulation concerning the packing of cantaloupes grown in Arizona; *Hunt* v. *Washington Apple Advertising Comm'n.* (1977), 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383, striking down a North Carolina statute which prescribed the labeling of containers in which apples were to be sold in that state; *A.& P. Tea Co.* v. *Cottrell* (1976), 424 U.S. 366, 96 S.Ct. 923, 47 L.Ed.2d 55, holding unconstitutional the application of a Mississippi regulation that milk and milk products could be sold in Mississippi from another state only if the other state had reciprocal provisions for Mississippi milk, where a Louisiana producer was refused a permit from Mississippi; *Complete Auto Transit, Inc.* v. *Brady* (1977), 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326, reh.den. 430 U.S. 976, which we will discuss more in detail hereafter; *Washington Rev. Dept.* v. *Stevedoring Assn.* (1978), 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682, also discussed hereafter.

Plaintiffs have cited a number of other cases, but their full recitation here would only be cumulative.

The District Court, in ruling on the motions to dismiss, determined that the cases relied on by the plaintiffs from the United States Supreme Court fell into four categories, which we here set forth together with some examples:[10]

(1) When Congress has asserted its regulatory powers under congressional acts. *Labor Board* v. *Jones & Laughlin, supra; Parker* v. *Brown, supra.*

(2) When the State engages in regulatory activity of interstate commerce. *Pike* v. *Bruce Church, Inc., supra; A. & P. Tea Co.* v. *Cottrell, supra.*

(3) When the state imposes a tax on interstate commerce activity. *Nippert* v. *Richmond, supra; Complete Auto Transit, Inc.* v. *Brady, supra.*

(4) When the state imposes a tax on an activity which is not in commerce. *Heisler* v. *Thomas Colliery Co., supra; Alaska* v. *Arctic Maid* (1961), 366 U.S. 199, 81 S.Ct. 929, 6 L.Ed. 227.

The District Court determined that the coal severance tax in issue here fell into the fourth category. The District Court further found that the cases in the fourth category involved a local incident subject to the state's reserved power of taxation on goods which preceded their entry into interstate commerce. We agree.

It is fair judicial policy for us not to regard as controlling here dicta found in cases in which the United States Supreme Court has upheld the regulatory powers of Congress under the commerce acts. See, for example of dicta, *Labor Board* v. *Jones & Laughlin, supra; Parker* v. *Brown, supra.*

It is likewise fair judicial policy for us not to feel bound here by dicta found in cases involving states which have engaged in regulation of interstate commerce. Again, *see Pike* v. *Bruce Church, Inc., supra; Phila-*

delphia v. *New Jersey* (1978), 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475. Nor do we feel bound or controlled by dicta found in cases decided by the United States Supreme Court involving states [11] or municipalities which have imposed a tax on an interstate commerce activity. For example, *Nippert* v. *Richmond, supra; Complete Auto Transit, Inc.* v. *Brady, supra.* We rely instead on those cases where the United States Supreme Court has directly upheld state taxation of production, extraction or manufacturing.

While the plaintiffs have contended that the trend of the United States Supreme Court decisions has been to move away from the holdings in *Heisler, Oliver Iron Co.,* and *Hope Gas Co., supra,* we do not find that contention supported in cases involving state taxes. Indeed, if we can read the trend of the decisions, it has been the policy of the Supreme Court to open up and to allow, not to *prevent,* state taxation of *interstate commerce transactions.* What has occurred in those decisions is that the Supreme Court has moved away over the course of years from the "immunity per se" rule which prevented state taxation of interstate commerce, *LeLoupe* v. *Port of Mobile* (1887), 127 U.S. 640, 8 S.Ct. 1380, 32 L.Ed. 311, to a rule of accommodation which recognizes that interstate commerce, in utilizing the services and protections of a state is required to "pay its way". *See Western Live Stock* v. *Bureau* (1938), 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823. For this reason the Supreme Court has upheld state taxation which intrudes upon interstate commerce but where there exist local incidents which justify state taxation nevertheless.

General Motors v. *Washington* (1964), 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430; *Norton Co.* v. *Dept. of Revenue* (1951), 340 U.S. 534, 71 S.Ct. 377, 95 L.Ed. 517. Local incidents which are severable from interstate commerce but occur within a state, such that multiple taxation by other states on the same activity is not a threat, provide a basis which has brought about the standards [12] announced by the Supreme Court in *Complete Auto Transit, Inc.* v. *Brady, supra,* to find constitutional permissibility for state taxes *on interstate commerce.*

A most recent case demonstrating the tendency of the United States Supreme Court to encourage and allow state taxation of interstate commerce can be found in *Exxon Corp.* v. *Wisconsin Dept. of Revenue* (1980), ____ U.S. ____, 100 S.Ct. 2109, ____ L.Ed.2d ____. Exxon had filed income tax returns in Wisconsin using a geographical system of accounting which reflected only its Wisconsin marketing operations and which showed a loss for each year, resulting in no taxes being due. Exxon kept its accoutns in three major functional departments: exploration, refining, and marketing. Transfers of products and supplies among the three functional departments were theoretically based on competitive prices. Exxon had no exploration, production or refining operations in Wisconsin in the taxable years in question. Only marketing in Wisconsin was carried on by Exxon. Nonetheless, Wisconsin treated Exxon as a unit, and apportioned its income in such manner that a tax was produced, for which Wisconsin made demand upon Exxon. The United States Supreme Court held that

Wisconsin was not prevented from applying its statutory apportionment formula to appellants' total income under the due process clause of the Fourteenth Amendment. It held that the unitary business principle was a proper basis for apportioning state income tax upon an interstate enterprise when its income can be reasonably related to the activities of the corporation within the taxing state. The Wisconsin tax was held valid even though its statutory apportionment formula indirectly taxed income derived from extraction or refinement of oil and gas located outside the state. The Supreme Court found nexus, proper [13] apportionment, and a rational relationship between the income attributed to the state and the interstate values of the enterprise. (*Compare Mont. Dept. of Rev.* v. *Am. Smelting & Refining* (1977), 173 Mont. 316, 567 P.2d 901.)

Mobile Oil Corp. v. *Com'r. of Taxes of Vermont* (1980), ____ U.S. ____, 100 S.Ct. 1223, 63 L.Ed. 510, likewise approved such apportionment, finding a nexus is established if the corporation avails itself of the substantial privilege of carrying on business within the state.

These recent cases buttress our statement that plaintiffs have misread the trend of the United States Supreme Court cases. That trend lies in the direction of allowing states to tax products in interstate commerce, once a nexus with the taxing state is established.

The intent and portent of the United States Supreme Court in these cases is not to overturn the holdings of *Heisler, Oliver Iron Co.,* and *Hope Gas Co., supra.* Indeed the Court has consistently recognized the vitality

of those holdings on production and extraction. In *Freeman* v. *Hewit, supra,* Justice Frankfurter expressed the distinction between permissible and prohibited taxes as follows:

> ". . . a seller State has various means of obtaining legitimate contribution to the cost of its government, without imposing a direct tax on interstate sales. While these permitted taxes may in an ultimate sense come out of interstate commerce, they are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than 150 years has been the ward of the commerce clause." 329 U.S. at 256, 67 S.Ct. at 278, 91 L.Ed. 274.

In like manner, state taxation of manufacturing within a state has also been upheld, though manufacturing of goods destined for commerce may be thought to present a weaker case than the production or extraction of goods. *Adams Mfg. Co.* v. *Storen* (1938), 304 U.S. 307, 58 S.Ct. 913, 82 L.Ed. 1365. [14]

The intent of the United States Supreme Court to preserve these fields for state taxation as preliminary to interstate commerce and within the reserved taxing powers of the states is manifest. In *Alaska* v. *Arctic Maid, supra,* for example, the court found that Alaska's taxing of the gathering and freezing of fish taken from Alaska's territorial waters by ships was a "preliminary local business", to be compared with *Oliver Iron Co., supra,* as its "first cousin"; this, even though the ships eventually took their frozen cargo directly from the sea

to the State of Washington for canning. From that evident intent of the Supreme Court, we find this portent: there is no indication by the United States Supreme Court that its historical judicial sanction of state taxation on production, extraction and manufacturing is in jeopardy.

Indeed, the very inference of such a threat in a Supreme Court opinion would have raised such a clamor that the case would be a benchmark. We find none, and can only conclude that the Supreme Court will be as consistent in this area in the future as it has been in the past.

See Federal Compress Co. v. *McLean* (1934), 291 U.S. 17, 54 S.Ct. 267, 78 L.Ed. 622; and *Chassaniol* v. *Greenwood* (1934), 291 U.S. 584, 54 S.Ct. 541, 78 L.Ed. 1004; referred to with approval in *Pike* v. *Bruce Church, Inc., supra.* Also *Caskey Baking Co.* v. *Virginia* (1941), 313 U.S. 117, 61 S.Ct. 881, 85 L.Ed. 1223.

The importance of these reserved fields of taxation to the states cannot be overstated. The State of Texas, whose attorney general appears before us as amicus opposing Montana's tax, will realize $980 million in oil and gas production taxes this year. The State of Alaska has sufficient reveues from the severance of oil and gas within its borders that its [15] 1980 legislature, before its recent adjournment, provided $900 million in an inviolate trust, not unlike Montana's, from those revenues. Such examples of local taxes could be added to almost state by state. No more important case on the power of states to levy taxes can be imagined than is presented here. For if the *rate of tax* on a local activity,

as here, can be found to violate the commerce clause, then certainly the *amount of tax* raised by a state on a local activity is in the same jeopardy. Were we or the United States Supreme Court to reach that result, then we should see, in the words of the old spiritual that "the walls came a-tumblin' down."

Plaintiffs' attack here is another in a series that seeks to assail and overturn the recognized power of states in these regards. In *Bel Oil Corporation* v. *Roland* (1962), 242 La. 498, 137 So.2d 308, appeal dismissed 371 U.S. 2, the state court upheld the validity of a severance tax on the extraction of natural gas in Louisiana. In *Industrial Uranium Co.* v. *State Tax Commission* (1963), 95 Ariz. 130, 387 P.2d 1013, an Arizona privilege tax on mining was upheld. In *Post Oak Oil Company* v. *Oklahoma Tax Com'n.* (Okla. 1978), 575 P.2d 964, a state excise tax on the severance of natural gas in Oklahoma withstood a commerce clause attack. All of these courts relied, as we do, on the continued adherence by the United States Supreme Court to its steady course of sanction in these fields.

On the basis that the severance of coal here is a taxable event that precedes entry into interstate commerce, we rule without hesitation that plaintiffs cannot prevail on their claims under count I of their complaints, because Montana's coal severance tax does not violate the commerce clause. The severance of coal by mining is not an interstate activity. [16]

In oral argument, the plaintiffs asked us to give them a straight up-and-down decision on whether the coal severance tax was governed by the commerce clause. We

have done that in the foregoing paragraphs. However, we feel compelled to remark that even if the commerce clause in this case obtained, plaintiffs could not have prevailed and the motion dismissing the complaints would have been properly granted in any event.

In making their commerce clause argument, the plaintiffs have contended that we were bound to apply the tests set forth in *Complete Auto Transit, Inc., supra.* In that case, the United States Supreme Court considered the constitutionality of a Mississippi tax on the "privilege of doing business in that state." The earlier case of *Spector Motor Service* v. *O'Connor* (1951), 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573, had adopted a formalistic test to the effect that taxes on the "privilege" of doing interstate business violated the commerce clause. The United States Supreme Court in *Complete Auto Transit, Inc.* overruled *Spector* stating that state taxes affecting interstate commerce must be viewed as to their practical effect and must be examined in light of a four-pronged test of that practical effect:

(1) Whether the tax is applied to an activity with a substantial nexus with the taxing state,

(2) Whether it is fairly apportioned,

(3) Whether the tax does not discriminate against interstate commerce and,

(4) Whether the tax is fairly related to the services provided by the state. 430 U.S. at 277-8, 97 S.Ct. at 1078, 51 L.Ed.2d at 330.

Washington Rev. Dept. v. *Stevedoring Assn., supra,* [17] upheld this four-pronged test and further recognized

that a state had a significant interest in exacting *from interstate commerce* its fair share of the cost of state government. 435 U.S. at 748, 98 S.Ct. at 1398, 55 L.Ed.2d at 695.

Complete Auto Transit, Inc. is a good example of our earlier assertion that the United States Supreme Court, instead of intruding upon the reserved fields of taxation allowed the state on local activities, has been moving toward a permissive or accomodating position allowing state taxation of interstate commerce under certain conditions.

Applying the *Complete Auto Transit, Inc.* four-pronged test, for the sake of argument, to the case at bar, plaintiffs could not prevail as a matter of law. Surely there can be no argument here that a substantial, in fact, the only nexus of the severance of coal is established in Montana. There can be no discussion of apportionment, because the severance can occur in no other state. There is no danger of multiple taxation, for no other state can tax the severance. *See, Chassaniol, supra; compare, Mich.-Wis. Pipeline Co.* v. *Calvert* (1954), 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583.

There would remain, if *Complete Auto Transit, Inc.* applied, only the fourth test, whether the tax is fairly related to the services provided by the state.

The taxpayers here, the coal producers, have the right to and the availability of all the governmental comforts and protection which this state provides. Since the United States Supreme Court is tending toward the position that interstate commerce must pay its way in the

respective states affected thereby, it is with logic of great force that Montana can require strip-coal mining to assume its just share for the cost of the state government that it [18] enjoys, and for the governmental cost that has occurred, is now occurring, and will in the future occur as the direct result of such strip-coal mining. Here Montana meets the test set out in *General Motors v. Washington, supra,* 377 U.S. at 441, 84 S.Ct. at 1568, 12 L.Ed.2d at 435:

> "For our purposes the decisive issue turns on the operating incidents of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the state and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. . ."

It is impossible for any court to foot up the dollar cost of the governmental benefits received and to be received by the taxpayers here. Aptly the state points out the heart of plaintiffs' complaint is the *rate* of the tax. The state further contends that no United States Supreme Court opinion invalidating a state levy has turned on the rate of a tax. No summation of the cost of governmental benefits has ever been required by any court in determining the validity of a rate of levy in a general excise, property or income tax imposed by a state. It is said:

> "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the

> taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes . . . . Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government—that it exists primarily to provide for the public good." Carmichael v. Southern Coal Co. (1937), 301 U.S. 495, 522-523, 57 S.Ct. 868, 878-879, 81 L.Ed. 1245, 1260-1261.

The rate of tax is a determination for the legislature to make, not a court. Montana's legislature has determined that its coal severance tax is fairly related to the governmental services Montana provides, and to the benefits of a trained [19] work force and the advantages of a civilized society. *See, Japan Line, Ltd.* v. *County of Los Angeles* (1979), 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed.2d 336; *Washington Rev. Dept.* v. *Stevedoring Assn., supra.* We are not talking here about "user" charges or like fees imposed for the use of state facilities where the charge for the service must bear some fair relation to the service or property provided for use. Such "user" charges are capable of being determined. *See Evansville Airport* v. *Delta Airlines* (1972), 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620. Taxes as here imposed for the general support of the government are fairly related to that purpose by the mere fact that a government is thereby maintained. It is only when the taxpayer has an insufficient nexus to the taxing state, or

the tax is disproportionate to the incidents of commerce being taxed, that the fair-relation test applies. *See, e.g. National Bellas Hess, Inc.* v. *Dept. of Revenue* (1967), 386 U.S. 753, 756, 758, 87 S.Ct. 1389, 18 L.Ed.2d 505.

Complete Auto Transit, Inc., is intended to apply to situations where a state or local taxing authority adopts a tax that intrudes upon, hampers or obstructs in some fashion interstate commerce. It has no application in this case to the intrastate severance of coal by mining. But even if *Compete Auto Transit, Inc.* applied, as we have shown, plaintiffs could not prevail here as a matter of law.

We note that a tax of thirty percent of the coal's value at the time of its severance is not any indication of the impact of the severance tax as to the cost of coal at its final destination, in-state of out-of-state. The attorney general of Texas, appearing here as amicus, informed us in oral argument that Montana coal destined for Texas is now [20] purchased at $7 per ton at the mine, resulting in a severance tax in Montana of $2.10 per ton; however, the coal at destination in Texas cost $30 per ton. Most of the added price comes from the cost of transportation of the coal to Texas, which costs, the attorney general informed us, have increased from $8 per ton to $20 per ton in a short time. Demonstrably therefore, as to Texas, the interstate impact of the Montana coal severance tax is no greater than that of federal and state taxes on gasoline at the pump (before the recent price increases) or the state and city sales taxes on goods and services found in most localities. On the same tack, when we consider the customers of the utilities who are appearing

in this case, it is obvious without argument or proof that coal costs are only a portion of total generating costs of electricity. Although plaintiffs have contended that Montana's coal tax is passed on to the utility consumers, it must be admitted that this is because of the particular terms of the coal contracts of purchase entered into by the utility-plaintiffs. It would be strange indeed if the legality of a tax could be made to depend on the vagaries of the terms of contracts. We do not assume that in the broad picture all of the Montana coal tax is passed on to consumers because Montana does not have a monopoly in the production of coal. Montana coal must compete in the market with coal produced in Wyoming, North Dakota, and other sources of supply. Under those circumstances, economic factors will determine whether the producers will shoulder all or part of the tax, or pass it on in the form of increased prices.

The argument therefore that Montana is "exporting its coal tax" to out-of-state users has no more force in reality [21] when applied to Montana coal than to any other type of lawful tax on goods or products eventually moving in interstate commerce. Certainly, taxes paid on goods and products from origin to the eventual consumer are a factor in the final price to the consumer; that is an economic fact of our lives. In that sense, every state or locality that levies a tax on goods or products originating therein or manufactured therein is exporting its tax. No sane rule of law can or should be developed that would make a local tax illegal solely because it is a factor in the cost the eventual consumer pays. Such a rule would make state government taxation of goods and products a judicial morass.

It is for these reasons that we have determined, as we have stated earlier, to look at the status of the true taxpayers in this case, the producers of the coal. The Montana severance tax is levied at the time the coal is separated by the producer from the realty in Montana at its value when sold in Montana. In that light we have no difficulty in finding that Montana has the power as a state to tax the severance of coal within its borders. Plaintiffs contended in oral argument that because the coal bought by the utilities from the producers was already under contract for sale when mined, that the instant the coal was severed, it was in interstate commerce. We do not have to address that argument because the taxable event, as far as Montana is concerned is the act of severance itself. The event of severance necessarily precedes the instant when the coal ceases to be part of the realty and becomes part of the mass personality in Montana. We are not required here to determine whether the mined coal should not be considered a part of interstate commerce until the moment when the producer hands the coal over to the buyer, or its transporter [22] for the account of the buyer. There is no need to concern ourselves with such fine points here. The severance itself is a taxable event and the Montana statutes here tax that event in advance of any entry of the coal into commerce. In other words, the coal is produced and that production is taxed. Montana's coal severance tax is therefore ahead of and preliminary to the sweep of the power of Congress to regulate commerce. If this be not so, Montana and all other states would have to concede that any power of a state to tax the production of products which may

eventually enter into interstate commerce is at the whim or forbearance of the federal government. Neither the United States Supreme Court nor any other court has so held, and well enough, for such a decision would shatter the shield of judicially-approved states' rights in this field.

When it is realized that the coal producing plaintiffs are the real and only taxpayers of the Montana tax, the "exported tax" theory falls. With it falls the notion that there is no political check on the Montana legislature to limit the tax. Experience shows the producer plaintiffs are a vigorous presence at any session of the Montana legislature. Records of the Montana Secretary of State, of which we take judicial notice, Rule 202(b), M.R.Evid., show the number of lobbyists registered for the coal industry in recent sessions, sections 5-7-103 and 5-7-201, MCA, and their participation before legislative committees on matters affecting the coal industry.

Finally, with respect to the commerce clause, plaintiffs have continued to assert an argument which does not raise a substantive issue or one material to our decision in this case, but nonetheless requires a comment lest our silence be considered an admission of its substance. [23]

The nonissue raised by plaintiffs is that since a good deal of the coal being mined by plaintiffs or potentially to be mined (in oral argument it was said 75% of the coal) underlies federal leases, this coal therefore is not Montana's "birthright" but belongs to the nation as a whole. The argument is intended to have us believe that Montana is taxing here not the coal producers, but the people of the United States themselves.

Montana, in common with many of the states, has a substantial portion of its surface area under federal ownership. In addition, the federal government reserved to itself coal and other minerals in many of its patents or deeds of grant. We assume this situation gives rise to the nonissue raised by the plaintiffs.

Plaintiffs' argument is addressed to emotion and not to law. As long as the federal coal remains in deposit under federal ownership, it is "our" coal in the sense that it belongs to the people through the federal government. Once mined under a federal lease or permit, title to the coal is vested as personal property in the lessee or permittee as soon as it is mined and removed from its original place, subject only the royalty rights of the lessor, *Olson* v. *Pedersen* (1975), 194 Neb. 159, 231 N.W.2d 310, the same as with oil and gas. *De Mik* v. *Cargill* (Okla. 1971), 485 P.2d 229. Montana may impose taxes on the private lessees of federal lands. 30 U.S.C. § 189; *Oklahoma Tax Comm'n.* v. *Texas Co.* (1949), 336 U.S. 342, 69 S.Ct. 561, 93 L.Ed. 721; reh.den. (1949), 336 U.S. 958, 69 S.Ct. 887, 93 L.Ed. 1111.

The coal being taxed here therefore is not "our" coal, but the personal property of the plaintiffs who produced it under lease or permit. When the coal is mined, the federal government is in no different position as a lessor than a private lessor who grants a mining lease or permit. [24]

THE SUPREMACY CLAUSE

"This [federal] Constitution and the Laws of the United States which shall be made in Pursuance

thereof," states U.S. CONST., Art. VI, Cl. 2, ". . . shall be the supreme Law of the Land . . . ."

Here plaintiffs contend that Montana's coal severance tax is preempted because it "frustrates and impairs" implementation of federal policy; that the District Court misconceived the national policies involved here; that the overall national energy policy is to encourage a greatly expanded production and use of western coal; and that the question of substantial frustration is one of fact which cannot be determined on the pleadings.

Montana responds that the plaintiffs have failed to allege or to identify any "Laws of the United States" which the coal severance tax could frustrate or impair; and that the general policy considerations and goals alleged by plaintiffs are not "laws of the United States" which are declared to be the "supreme Law of the Land."

The motion to dismiss made by the State in the District Court challenged the legal sufficiency of the supremacy clause claim of the plaintiffs.

It is conceded by the plaintiffs that Congress has not expressly preempted or limited the authority of the State to levy the coal severance tax, nor "clearly and unmistakably" required the conclusion that Congress intended to prohibit or limit the tax. Rather the plaintiffs contend, as their complaints allege:

> "32. That the coal severance tax, on its face, and as applied, substantially frustrates and impairs fulfillment of national policies and purposes of certain acts of Congress." (App. 27) [25]

Under this argument plaintiffs contend that proof of "substantial frustration" does not require plaintiffs to show a specific Congressional intent to preempt the field (Pl. Brief at 60).

In fine, plaintiffs have contended that it is not the tax, but the *rate of the tax* which constitutes an obstacle to federal policy and which requires a determination of fact as to whether such obstacle exists.

By their argument, plaintiffs seek to bring themselves within the coverage of statements made by the United States Supreme Court in *Ray* v. *Atlantic Richfield Co.* (1978), 435 U.S. 151, 158, 98 S.Ct. 988, 55 L.Ed.2d 179; *Jones* v. *Rath Packing Company* (1977), 430 U.S. 519, 525-526, 97 S.Ct. 1305, 51 L.Ed.2d 604; reh.den. (1977), 431 U.S. 925, 97 S.Ct. 2201, 53 L.Ed.2d 240; *De Canas* v. *Bica* (1976), 424 U.S. 351, 357 n. 5, 96 S.Ct. 933, 47 L.Ed.2d 43; and *Perez* v. *Campbell* (1971), 402 U.S. 637, 652, 91 S.Ct. 1704, 29 L.Ed.2d 233. Plaintiffs claim to be inheritors of the decision in *M'Culloch* v. *Maryland* (1819), 17 U.S. 415 (4 Wheat. 316), 4 L.Ed. 579.

In making its determination on the preemption issue, the District Court examined the following acts of Congress submitted or cited to the District Court as acts which defined the federal policies in the field:

> Powerplant and Industrial Fuel Use Act of 1978 Pub. Law No. 95-620, 92 Stat. 3289
>
> Natural Gas Policy Act of 1978 Pub. Law No. 95-621, 92 Stat. 3351
>
> Energy Conservation and Production Act Pub. Law No. 94-385, 90 Stat. 1125

Energy Policy and Conservation Act Pub. Law No. 94-163, 89 Stat. 871

Federal Nonnuclear Energy Research and Development Act of 1974 Pub. Law No. 93-577, 88 Stat. 1878 [26]

Energy Reorganization Act of 1974 Pub. Law No. 93-438, 88 Stat. 1233

Energy Supply and Environmental Coordination Act of 1974, Pub. Law No. 93-319, 88 Stat. 246

Emergency Petroleum Allocation Act of 1973, Pub. Law No. 93-159, 87 Stat. 627

Clean Air Amendments of 1970 Pub. Law No. 91-604, 84 Stat. 1676

From those acts, the District Court determined that there was a national policy to provide incentives to increase the use of other sources of energy, including coal, so as to decrease our dependence on oil. The District Court also determined from those acts, and from the cases it examined relating the subject, that "Congress has not and did not intend to preclude the State of Montana from imposing a tax on mining activities within the State. . ." App. at 240. It is in this conclusion of law that the plaintiffs now contend on appeal that the District Court erred: The plaintiffs do not claim that the federal acts submitted to the District Court establish a national policy which prevents Montana from levying *some* tax on the severance of coal. Instead, plaintiffs contend that the District Court should have allowed a factual hearing to determine whether the *rate* of

Montana's coal severance tax substantially frustrates national policy; and that the order of the District Court precluded plaintiffs from proving what the national energy policy was.

Some seventy or eighty years ago it used to be argued that the Constitution of the United States followed the flag. Here, plaintiffs in reality are contending that the Constitution follows the Dow-Jones average.

In examining the whole of the District Court's memorandum in support of its order, we think it implicit in the District Court's opinion not only that Montana is not prohibited [27] by federal enactments and policy from levying a coal severance tax but also that the amount of Montana's coal severance tax is not prohibited. In any event, we find the latter conclusion is a necessary result as a matter of law under the preemption argument.

Out of the welter of cases which has been cited to us on this issue by the parties, we, upon examination of such authorities, find it safe to say that no state excise tax has ever been struck down unless it had clearly conflicted with an act of Congress in the field *(M'Culloch* v. *Maryland, supra);* and likewise, that no state excise tax is likely to be held by the United States Supreme Court to be *limited* as to its *amount* unless it is expressly or by necessary implication shown to be prohibited or that the amount interferes with a power assumed or delegated to the United States.

The essence of the rule upon which we rely here, and of the rule which we think inheres in any of the United

States Supreme Court decisions on the subject is set out in *Penn Dairies* v. *Milk Control Comm'n.* (1943), 318 U.S. 261, 275, 63 S.Ct. 617, 623-24, 87 L.Ed. 748, 756-57:

> "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication, *United States v. Borden Co,* 308 U.S. 188, 198-9; *United States v. Jackson,* 302 U.S. 628, 631; *Posadas v. National City Bank,* 296 U.S. 497, 503-5, should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation.
>
> ". . . Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Furthermore we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden." [28]

The mere statement by the plaintiffs that the Montana coal severance tax substantially frustrates a national policy for the use of western coal is not a sufficient basis to trigger a factual determination in the District Court.

The scope and substance of national policy are matters of statutory interpretation. This is a matter of law not requiring the taking of testimony. Again, of course, for purposes of a motion to dismiss, a District Court is not required to accept plaintiffs allegations of law and legal conclusions as true. *Newport News Co.* v. *Schauffler* (1938), 303 U.S. 54, 58 S.Ct. 466, 82 L.Ed. 646; *Mitchell* v. *Archibald and Kendall, Inc.* (7th Cir. 1978), 573 F.2d 429, 432; *Kadar Corporation* v. *Milbury* (1st Cir. 1977), 549 F.2d 230, 233; *Blackburn* v. *Fisk University* (6th Cir. 1971), 443 F.2d 121, 124.

Whether we agree here with plaintiffs that the decision of the District Court was only to the effect that no federal enactments prohibited *any* coal tax is of no moment. The reason for the district judge making that finding was that he could find no federal enactment of specific policy with respect to which the Montana coal severance tax conflicted. For the same reason, when we examine plaintiffs' contention that the amount of the tax constitutes a substantial frustration of federal policy, that argument must also fall because of plaintiffs' failure to establish a federal enactment with which the amount of Montana tax conflicts or which is substantially frustrated.

We find ourselves in agreement with the District Court that the federal statutes cited do not establish domestic energy policies wherein Congress intended to nullify other national, state, local or individual policies or interests which may increase the cost of coal production in use. [29] Stated another way, we do not find a national domestic energy policy or congressional enactments predicated upon a Montana coal severance tax of

fifteen percent or less. Indeed, the federal enactments point in other directions. There are incentives for the development of underground coal mines. 42 U.S.C. § 6211. There is a provision for export restrictions. 42 U.S.C. § 6212. Miners of low sulfur coal are not exempted from costly environmental strip mining regulations. 30 U.S.C. § 1251, et seq. Health and safety requirements are enforced upon strip coal miners. 30 U.S.C. § 801, et seq. Royalties on federal lands are payable under the Mineral Lands Leasing Act of 1920 as amended. 30 U.S.C. § 181, et seq. Congress seems to prefer underground coal mining. 30 U.S.C. § 1201, et seq. As the District Court found, to the distaste of the plaintiffs, Congress favors and encourages the production and use of high sulfur eastern and midwestern coal, rather than low sulfur western coal, the latter of which is to be used principally by existing facilities for which technological upgrading of air pollution control equipment is impractical or not feasible. 42 U.S.C. §§ 7411 and 7425. Indeed, § 7411, as amended in 1977, requires users of low sulfur coal nevertheless to install the "best technological system of continuous emission reduction" required for all stationary sources, even though such systems may be unnecessary because the low-sulfur coal meets the emission standards. *See,* U.S. Code Congressional and Administrative News, 95th Congress, 1977 Session, Vol. II, at 1245. Congress would rather that eastern and midwestern plants used "local coal," even coal with higher sulfur content than western low-sulfur coal.

How then can any court determine that the effect of Montana's coal severance tax is to frustrate national

policy, [30] when no national policy can be discerned as a matter of law?

The federal constitutional prohibition, under the supremacy clause, is against state laws which contravene "the laws of the United States which shall be made in pursuance of [the federal constitution]." What is wanting in plaintiffs' argument is *any* federal enactment, constitutionally adopted, which is clearly, substantially frustrated by Montana's coal severance tax.

The taxing power of the state is an essential power of its sovereignty. *Weston* v. *City Council of Charleston* (1829), 27 U.S. 171, 174 (2 Peters 449), 7 L.Ed. 481. This power cannot be set aside or limited on weightless statements that a federal policy is being substantially frustrated.

Contrary to the contention of plaintiffs, *De Canas* v. *Bica, supra,* was not sent back by the Supreme Court for a factual determination, but rather for a construction by the California courts of California statutory law. *De Canas* v. *Bica, supra,* 424 U.S. at 363-364, 96 S.Ct. at 940, 47 L.Ed.2d at 53-54. In *Exxon Corp.* v. *Governor of Maryland* (1978), 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91, reh.den. 439 U.S. 884, the United States Supreme Court rejected a contention that a broad general national policy can preempt state laws which have some indirect effect upon national policy. The court said in *Exxon*:

> "Appellants point out . . . the . . . basic national policy favoring free competition, and argue that the Maryland statute 'undermine[s]' the competitive balance that Congress struck between the Robinson-

> Patman and Sherman Acts. This is just another way of stating that the Maryland statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—our 'charter of economic liberty.' Northern Pacific R. Co. v. United States, 356 U.S. 1, 4. Nevertheless, [31] this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed. We are, therefore, satisfied that neither the broad implications of the Sherman Act nor the Robinson-Patman Act can fairly be construed as a congressional decision to pre-empt the power of the Maryland Legislature to enact this law." 437 U.S. at 133-134, 98 S.Ct. at 2217-2218, 57 L.Ed.2d at 104-105.

Again, under this preemption contention, a large number of cases are cited by the parties. Recitation of their holdings and effect would be cumulative here. Plaintiffs have attacked the decision of the District Court upon the ground that no court case was relied on by it to find that Montana's coal severance tax did not contradict a federal national policy. On this point, plaintiffs are stoking the same furnace as did the District Court. Plaintiffs have led us to no decision invalidating a state excise tax based on its rate as in contravention of federal policy.

We conclude that from any viewpoint, whether as a question of the power of the State of Montana to levy

any tax, or its power to levy a tax at the rate here set forth, there has been no preemption by the federal government in the field of coal severance taxation, or any national policy derived from Congressional enactments pursuant to the Constitution with which the Montana coal severance tax is in conflict.

THE FEDERAL MINERAL LANDS LEASING ACT OF 1920

Here, plaintiffs assert that the severance tax violates the Supremacy Clause of the United States Constitution on the ground that the tax grossly distorts the "compromise" between the federal government and the states expressed in the Mineral Lands Leasing Act of 1920, Chapter 85, 41 Stat. 437, as amended by the Federal Coal Leasing Amendments Act of 1975, Pub. Law No. 94-377, 90 Stat. 1083. [32]

Plaintiffs contend the federal legislation is a result of a longstanding debate concerning the ownership, disposition and use of federally owned mineral reserves in the western territories and states. The result, claim plaintiffs, is that the federal government retained the minerals for the people of the nation, subject to the payment of a share of the mineral royalties to the states in which the minerals were located.

Under the Act of 1920, as amended, fifty percent of amounts received by the federal government from sales, bonuses, royalties and rental of public lands thereunder are returned to the respective states wherein the leased lands or deposits are located, for uses specified in the Act. Plaintiffs claim Montana is without power, because

it substantially frustrates national policy, to tax the "economic rents" remaining over and above the rents and royalty payments. "Economic rents" are defined as the difference between the costs of production, including an acceptable profit, and the price which the products could obtain in the market place. Plaintiffs state that Montana has appropriated the "economic rents", which plaintiffs find to be a fundamental frustration of federal policy.

Here again, plaintiffs argue that they are not required to show an express prohibition under federal law; rather they contend that substantial frustration of the fulfillment of national policy is sufficient to render the state law unconstitutional under the supremacy clause.

The principal factor militating against plaintiffs' position on this part of their complaint is that Congress specifically allowed state taxation under the Mineral Lands Leasing Act of 1920. The Act contains this provision (30 U.S.C. § 189): [33]

> ". . . Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States."

If indeed, a "compromise" was reached with respect to the leasing of federally-owned mineral interests in public lands, that compromise included, under 30 U.S.C. § 189, the right of states to tax the "output of mines".

This indeed is a clear expression of federal policy and Montana's coal severance tax is within that policy.

In *Mid-northern Oil Co.* v. *Montana* (1925), 268 U.S. 45, 45 S.Ct. 440, 69 L.Ed. 841, *affirming Mid-northern Oil Co.* v. *Walker* (1922), 65 Mont. 414, 211 P. 353, the Supreme Court said:

> ". . . [A]lthough the act deals with the letting of public lands and the relations of the government to the lessees thereof, nothing in it shall be so construed as to affect the rights of the states, in respect of such private persons and corporations, to levy and collect taxes as though the government were not concerned." 268 U.S. at 49, 45 S.Ct. at 441, 69 L.Ed. at 843.

The Supreme Court also said:

> "No doubt, what Congress immediately had in mind was the necessity of making it clear that, notwithstanding the interest of the government in leased lands, the rights of the states to tax improvements thereon and output thereof should not be in doubt. . . . We think the proviso plainly discloses the intention of Congress that persons in corporations contracting with the United States under the act, should not, for that reason, be exempt from any form of state taxation otherwise lawful." 268 U.S. at 50, 45 S.Ct. at 441, 169 L.Ed. at 843.

Again the District Court was correct in dismissing plaintiffs complaints under count 3 as a matter of law, for no justiciable controversy is presented by such count.

CONCLUSION

The judgment of the District Court in dismissing the plaintiffs complaints is affirmed.

John C. Sheehy
Justice

We Concur:

Frank I. Haswell
Chief Justice

Gene B. Daly

John Conway Harrison

Daniel J. Shea
Justices

Notice of Appeal in the Supreme Court of Montana—October 2, 1980

IN THE
SUPREME COURT
OF THE STATE OF MONTANA
No. 14982

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY and WESTMORELAND RESOURCES, INC.,

Plaintiffs-Appellants,

—VS—

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, RAY DORE, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and VERA S. FRESEMAN, STATE TREASURER,

Defendants-Appellees.

LAKE SUPERIOR DISTRICT POWER COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, and WESTERN ENERGY COMPANY,

Plaintiffs-Appellants,

Notice of Appeal

—vs—

STATE OF MONTANA, RAY DORE, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and VERA S. FRESEMAN, STATE TREASURER,

Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that each and all of the Plaintiffs and Appellants above-named, except Western Energy Company, hereby appeals to the Supreme Court of the United States from that final decision of the Supreme Court of the State of Montana, rendered [2] on July 17, 1980, affirming the decision and order of the Lower Court dismissing plaintiffs' claims against the defendants.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph 2.

Dated this 2nd day of October, 1980.

ROGERS & WELLS
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BY /s/ Patrick F. Hooks

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Notice of Appeal in the Supreme Court of Montana—October 6, 1980

IN THE
SUPREME COURT
OF THE STATE OF MONTANA
No. 14982

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY and WESTMORELAND RESOURCES, INC.,

Plaintiffs-Appellants,

—VS—

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, RAY DORE, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and VERA S. FRESEMAN, STATE TREASURER,

Defendants-Appellees.

LAKE SUPERIOR DISTRICT POWER COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, and WESTERN ENERGY COMPANY,

Plaintiffs-Appellants,

—vs—

STATE OF MONTANA, RAY DORE, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and VERA S. FRESEMAN, STATE TREASURER,

Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that the Plaintiff and Appellant above-named, Western Energy Company, hereby appeals to the Supreme Court of the United States from that final decision of the Supreme Court of the State of Montana, rendered on July 17, 1980, affirming the decision and order of the Lower Court dismissing Plaintiffs' claims against the Defendants. [2]

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph 2.

DATED this 6th day of October, 1980.

/s/ JOHN CARL

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Complaint in *Commonwealth Edison Co., et al.* v. *State of Montana, et al.*—June 20, 1978

IN THE

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA

IN AND FOR THE COUNTY OF LEWIS AND CLARK

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, and WESTMORELAND RESOURCES,

Plaintiffs,

—against—

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, RAY DORE, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and VERA S. FRESEMAN, STATE TREASURER,

Defendants.

COMPLAINT FOR REFUND OF TAXES PAID UNDER PROTEST AND FOR DECLARATORY AND INJUNCTIVE RELIEF

Complaint in Commonwealth Edison Co., et al. v. State of Montana, et al.—June 20, 1978

Plaintiffs, by their undersigned attorneys, allege the following causes of action against defendants State of Montana ("Montana"), Thomas L. Judge, individually and as Governor of the State of Montana ("Judge"), Ray Dore, individually and as Director of the State Department of Revenue ("Dore"), and Vera S. Freseman, individually and as State Treasurer ("Freseman").

PARTIES

[2]1. Utility Plaintiffs. The following plaintiffs are sometimes hereinafter referred to as "Utility Plaintiffs":

1.1 Commonwealth Edison Company ("Commonwealth Edison") is a corporation organized and existing pursuant to the laws of the State of Illinois.

1.2 Central Illinois Light Company ("Central Illinois Light"), is a corporation organized and existing pursuant to the laws of the State of Illinois.

1.3 Dairyland Power Cooperative ("Dairyland") is a cooperative organized and existing pursuant to the laws of the State of Wisconsin.

1.4 Detroit Edison Company ("Detroit Edison") is a corporation organized and existing pursuant to the laws of the States of New York and Michigan.

1.5 Interstate Power Company ("Interstate") is a corporation organized and existing pursuant to the laws of the State of Delaware.

1.6 Lake Superior District Power Company ("Lake Superior") is a corporation organized and existing pursuant to the laws of the State of Wisconsin.

Complaint in Commonwealth Edison Co., et al. v. State of Montana, et al.—June 20, 1978

1.7 Lower Colorado River Authority ("LCRA")/ City of Austin ("Austin") is a joint venture of LCRA, an agency of the State of Texas, and Austin, an incorporated municipality organized and existing pursuant to the laws of the State of Texas.

1.8 Minnesota Power & Light Company ("Minnesota P&L") is a corporation organized and existing pursuant to the laws of the State of Minnesota.

[3] 1.9 Northern States Power Company ("Northern States") is a corporation organized and existing pursuant to the laws of the State of Minnesota.

1.10 Upper Peninsula Generating Company ("Upper Peninsula") is a corporation organized and existing pursuant to the laws of the State of Michigan.

1.11 Wisconsin Power & Light Company ("Wisconsin P&L") is a corporation organized and existing pursuant to the laws of the State of Wisconsin.

2. Coal Producing Plaintiffs. The following plaintiffs are sometimes hereinafter referred to as "Coal Producing Plaintiffs":

2.1 Decker Coal Company ("Decker") is a joint venture company with principal offices at Sheridan, Wyoming. Its joint venturers are Wytana, Inc., a corporation organized and existing pursuant to the laws of the State of Delaware, and Western Minerals, Inc., a corporation organized and existing pursuant to the laws of the State of Oregon.

2.2 Peabody Coal Company ("Peabody") is a corporation organized and existing pursuant to the laws of the State of Delaware.

2.3 Westmoreland Resources ("Westmoreland"), as used herein, refers to a certain partnership organized and existing under that name pursuant to the laws of the State of Montana and to its anticipated successor-in-interest, Westmoreland Resources, Inc., a corporation to be organized and to exist pursuant to the laws of the State of Delaware. The partners of the partnership have been Kewanee Industries, Inc., Morrison-Knudsen Company, Inc. and Westmoreland Coal Company, all [4] being corporations organized and existing pursuant to the laws of the State of Delaware, and Penn-Virginia Corporation, a corporation organized and existing pursuant to the laws of the State of Virginia.

3. Defendants. The following defendants are sometimes hereinafter referred to as "defendants":

3.1 Defendant Montana is a sovereign state of the United States of America.

3.2 Defendant Judge is Governor of Montana.

3.3 Defendant Dore is the Director of the Montana State Department of Revenue.

3.4 Defendant Freseman is the State Treasurer of Montana.

4. There exists between the parties an actual controversy, justiciable in nature and within the jurisdiction of this Court, in respect of which the Court can render

an adequate and effective judgment that will advance the interests of justice.

5. Chapter 525 of the Montana Laws of 1975 purports to impose a tax upon the severance of coal extracted in Montana. The said Chapter 525, as from time to time amended, is codified at Chapter 13 of Title 84 of the Revised Codes of Montana of 1947 and is hereinafter referred to as the "Coal Severance Tax."

6. Each Coal Producing Plaintiff and a non-party Western Energy Company ("Western Energy"), a corporation which, on information and belief, is organized and existing pursuant to the laws of the State of Montana, has operated and continues to operate one or more coal mines within Montana.

7. During the first calendar quarter of 1978, each Coal Producing Plaintiff and Western Energy extracted from such [5] mines large quantities of coal which, upon information and belief, are subject to the Coal Severance Tax.

8. All or substantially all of the coal extracted by the Coal Producing Plaintiffs in Montana is shipped by it to customers, including the Utility Plaintiffs, outside Montana.

9. A large proportion of the coal extracted by Western Energy in Montana is shipped to customers, including one or more Utility Plaintiffs, outside Montana.

10. Severance, extraction and shipment of coal by the Coal Producing Plaintiffs and by Western Energy for use

by the Utility Plaintiffs are activities in and which substantially affect interstate commerce.

11. The coal severed, extracted and shipped by the Coal Producing Plaintiffs and Western Energy plays an important role in enabling the Utility Plaintiffs to comply with the current regulations issued by agencies of the United States Government and by agencies of the various states under mandate of the United States Government.

12. Each Utility Plaintiff is a public utility which has operated and continues to operate electrical generation and distribution facilities in the following states and which has sold and continues to sell electrical power to consumers in such states:

12.1 Commonwealth Edison serves customers in Illinois.

12.2 Central Illinois Light serves customers in Illinois.

12.3 Dairyland serves customers in Illinois, Iowa, Minnesota and Wisconsin.

12.4 Detroit Edison serves customers in Michigan.

[6] 12.5 Interstate serves customers in Iowa, Minnesota and Illinois.

12.6 Lake Superior serves customers in Wisconsin and Michigan.

12.7 LCRA/Austin serves customers in Texas.

12.8 Minnesota P&L serves customers in Minnesota and Wisconsin.

12.9 Northern States serves customers in Minnesota, Wisconsin, North Dakota and South Dakota.

12.10 Upper Peninsula serves customers in Michigan.

12.11 Wisconsin P&L serves customers in Wisconsin.

13. Each Utility Plaintiff is obligated, pursuant to one or more written agreements, to purchase substantial quantities of coal extracted in Montana from one or more of the Coal Producing Plaintiffs or Western Energy, to wit:

13.1 Commonwealth Edison is obligated to purchase coal from Decker pursuant to certain written agreements dated January 14, 1971 and June 20, 1974.

13.2 Central Illinois Light is obligated to purchase coal from Westmoreland pursuant to a certain written agreement dated January 1, 1975, as from time to time amended.

13.3 Dairyland is obligated to purchase coal from Westmoreland pursuant to a certain written agreement dated June 15, 1972.

13.4 Detroit Edison is obligated to purchase coal from Decker pursuant to a certain written agreement dated August 14, 1973, as from time to time amended.

13.5 Interstate is obligated to purchase coal [7] from Westmoreland pursuant to a certain written agreement dated June 15, 1972.

13.6 Lake Superior is obligated to purchase coal from Western Energy pursuant to a certain written agreement dated January 1, 1974.

13.7 LCRA/Austin is obligated to purchase coal from Decker pursuant to a certain written agreement dated October 24, 1974.

13.8 Minnesota P&L is obligated to purchase coal from Peabody pursuant to a certain written agreement dated July 29, 1968, as from time to time amended.

13.9 Northern States is obligated to purchase coal from Western Energy and Westmoreland pursuant to certain written agreements dated August 16, 1972 and June 15, 1972, respectively, as from time to time amended.

13.10 Upper Peninsula is obligated to purchase coal from Western Energy and Westmoreland pursuant to certain written agreements dated February 16, 1977 and January 1, 1977, respectively.

13.11 Wisconsin P&L is obligated to purchase coal from Western Energy and Westmoreland pursuant to certain written agreements dated October 4, 1972 and June 15, 1972, respectively.

14. Each agreement identified in paragraphs 13 through 13.11, as from time to time amended, remains in full force and effect.

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15. On or about April 27, 1978, within sixty days preceding commencement of this action, the Coal Producing Plaintiffs and Western Energy made payments in respect of the Coal Severance Tax allegedly due and owing for the period from [8] January 1, 1978, to March 31, 1978. These payments equalled or exceeded the following amounts:

15.1 Decker paid $2,763,188.00 in such taxes.

15.2 Peabody paid $569,198.00 in such taxes.

15.3 Westmoreland paid $1,243,582.00 in such taxes.

15.4 Western Energy paid $2,443,737.56 in such taxes.

15.5 Pursuant to the Revised Codes of Montana, the payments identified in paragraphs 15 through 15.4 of the Complaint were made under protest, except that only $899,407.88 of the amount referred to in paragraph 15.4 was so paid.

16. From time to time hereafter, the Coal Producing Plaintiffs and Western Energy will be required to make additional payments of the Coal Severance Tax. Plaintiffs respectfully ask leave to amend this Complaint at the time of trial to recover all sums so paid.

17. Pursuant to the agreements identified in paragraphs 13 through 13.11 of this Complaint, the Utility Plaintiffs are obligated to reimburse the Coal Producing Plaintiffs and Western Energy for the tax payments identified in paragraphs 15 through 15.4 and 16 of this Complaint.

18. The ultimate burden of tax payments identified in paragraphs 15, 16 and 17 of this Complaint falls upon the Utility Plaintiffs and upon their customers in the states identified in paragraphs 12 through 12.11 of this Complaint.

FIRST CAUSE OF ACTION (BURDEN ON INTERSTATE COMMERCE—FAIR SHARE)

19. Plaintiffs repeat and reallege each and every [9] allegation set forth in paragraphs 1 through 18, and each subparagraph thereof, inclusive.

20. At the time each Coal Producing Plaintiff extracts coal from its mines in Montana, the ultimate destination of such coal is fixed and is known to be a destination outside Montana.

21. At the time Western Energy extracts coal from its mine in Montana for any Utility Plaintiff, the ultimate destination of such coal is fixed and is known to be a destination outside Montana.

22. From at least the time of severance from the earth until arrival and delivery of such coal at an ultimate destination outside Montana, such coal is and continues to be in and to substantially affect interstate commerce.

23. The Coal Severance Tax imposes taxes on strip mined coal, such as that mined by the Coal Producing Plaintiffs and Western Energy, ranging from 20% of value to 30% of value (but not less than 12 cents per ton), depending on heating quality.

24. All or substantially all of the coal shipped to the Utility Plaintiffs is taxed at 30% of value.

25. On information and belief, Montana anticipates that its revenues from the Coal Severance Tax will be not less than $34,099,000 in fiscal year 1978 ending June 30, 1978 and not less than $40,000,000 in fiscal year 1979 ending June 30, 1979.

26. The Coal Severance Tax is not fairly related to the services and protection provided by Montana.

27. The Coal Severance Tax discriminates against interstate commerce.

[10] 28. The Coal Severance Tax is unconstitutional under Article I, Section 8, Clause 3 of the United States Constitution in that its provisions unduly burden interstate commerce.

SECOND CAUSE OF ACTION
(PREEMPTION BY NATIONAL ENERGY AND CLEAN AIR POLICIES)

29. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1 through 18, and each subparagraph thereof, inclusive.

30. From time to time, the United States Congress has enacted legislation which declares it to be the national policy of the United States to stimulate and encourage production of coal to satisfy the energy requirements of the entire United States.

31. Congress has further enacted legislation which, in order to satisfy national policies with respect to air

quality and other environmental concerns, encourages or requires use throughout the United States of low-sulphur coal such as that mined by the Coal Producing Plaintiffs, Western Energy and others within Montana.

32. The Coal Severance Tax, on its face and as applied, substantially frustrates and impairs fulfillment of the foregoing national policies and, in particular, frustrates and impairs the purposes of the aforementioned Acts of Congress.

33. The Coal Severance Tax is unconstitutional under Article VI, Clause 2, of the United States Constitution in that its provisions conflict with and are preempted by the aforementioned federal statutes. [11]

THIRD CAUSE OF ACTION
(PREEMPTION OF FEDERAL COAL RESERVES BY STATUTES REGULATING PROCEEDS THEREFROM)

34. Plaintiffs (except Westmoreland) repeat and reallege each and every allegation set forth in paragraphs 1 through 18, and each subparagraph thereof, inclusive.

35. A substantial portion of the coal mined by the Coal Producing Plaintiffs (except Westmoreland) and by Western Energy and delivered to the Utility Plaintiffs is and continues to be mined pursuant to leases issued by the United States of America.

36. The Congress of the United States has heretofore considered at length the right to receive the economic rents to be derived from ownership and taxation of federal coal deposits in, among other places, Montana.

37. In or about 1920, Congress enacted the Mineral Lands Leasing Act of 1920 (41 Stat. 437).

38. Among other things, the Mineral Lands Leasing Act of 1920 effected a compromise between the federal government and the states by providing:

(a) that mineral and coal deposits theretofore owned by the United States would be retained by the United States for the benefit of the citizens of the entire country and not solely for the benefit of citizens of the particular states in which such deposits were located;

(b) that such deposits would be leased upon terms set by the Secretary of the Interior in a manner and at royalty rates which would encourage development thereof (30 U.S.C. § 201, *et seq.*); and

(c) that a certain percentage of royalties received by the United States from such leases would be [12] directly or indirectly paid over to the states in which such coal was located for the use and benefit of such states (30 U.S.C. § 191).

39. In or about 1976, Congress amended the aforementioned Mineral Lands Leasing Act of 1920 by enacting the Federal Coal Leasing Amendments Act of 1975 (90 Stat. 1083).

40. Among other things, the Federal Coal Leasing Amendments Act of 1975 provided:

(a) that minimum royalties on federally owned coal be increased (30 U.S.C. § 207);

(b) that the proportion of revenues received by the United States and paid over to the individual states in which leases were issued be increased (30 U.S.C. § 191); and

(c) that such revenues as may be paid to the states are "to be used by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this Act, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service. . . ." (30 U.S.C. § 191).

41. By the aforementioned federal statutes, Congress intended to, and did, establish the following federal policies, among others:

(a) that federally-owned coal in Montana and elsewhere was to be held in trust for the benefit of the citizens of the entire country; and

(b) that the economic rents attributable to the extraction of federally-owned coal were to be collected, in [13] the first instance, by the federal government through the instrumentality of coal leases entered into under the authority of the Secretary of the Interior upon terms to be negotiated and fixed by him, and thereafter divided between the federal government and the state in which such coal was located in the proportions provided by federal law.

42. By the enactment of the Coal Severance Tax, Montana intended to, and did, in violation of the aforesaid federal policies, appropriate to itself the economic rents attributable to the extraction of federally-owned coal from land in Montana.

43. The Coal Severance Tax grossly distorts the compromises between the federal government and the states, as contemplated in the Mineral Lands Leasing Act of 1920, and substantially frustrates and impairs the purposes of the aforementioned Acts of Congress.

44. The Coal Severance Tax is unconstitutional under Article VI, Clause 2, of the United States Constitution in that its provisions conflict with and are preempted by the aforementioned federal statutes.

FOURTH CAUSE OF ACTION
(IMPOUNDMENT OF FUNDS PAID UNDER PROTEST)

45. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1 through 18, and each subparagraph thereof, inclusive.

46. Pursuant to Section 84-4502 of the Revised Codes of Montana, entitled "Payment of Taxes under Protest—Action to Recover," the officer receiving payments of the Coal Severance [14] Tax under protest is required to deposit the same to the credit of a special fund to be designated as a protest fund; to invest the same in interest-bearing deposits; and to retain such protest fund until the final determination of any suit or action to recover same.

47. On information and belief, defendants Dore and Freseman acting individually, and all defendants acting on behalf of Montana, have transferred certain funds paid to them under protest by plaintiffs in violation of Section 84-4502 of the Revised Codes of Montana, and now threaten to transfer other such funds in violation of that section.

48. On information and belief, defendant Judge, acting individually and on behalf of defendant Montana, has caused, permitted or directed the other defendants to do the acts described in paragraph 47 in violation of Section 84-4502 of the Revised Codes of Montana.

WHEREFORE, plaintiffs pray that:

1. Defendants, and each of them, be required to repay to plaintiffs, as their respective interests may appear, the sums paid by the Coal Producing Plaintiffs and Western Energy identified in paragraphs 15 through 15.4 and 16 of this Complaint together with interest to the date of such repayments;

2. The Coal Severance Tax, as a whole and as to each provision thereof, be declared unconstitutional on its face and as applied to plaintiffs;

3. Defendants be enjoined, *pendente lite* and permanently, from relying upon or enforcing any provisions of the Coal Severance Tax against any plaintiff; [15]

4. Defendants be enjoined, *pendente lite* and permanently, from disbursing funds collected under the Coal Severance Tax except to repay the same, with interest; and

5. Plaintiffs be granted their costs and disbursements of this action, together with such other and further relief as this Court deems just and proper.

Dated: June 20, 1978

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MONTANA STATUTES

CHAPTER 35 OF THE MONTANA CODE ANNOTATED (EXCERPTS)

COAL SEVERANCE TAX

PART 1

GENERAL PROVISIONS

15-35-101. Legislative findings and declarations of purpose. (1) The legislature finds that while coal is extracted from the earth like metal minerals, there are differences between coal and metal minerals such that they should be classified in different categories for taxation purposes. The legislature finds that while coal can be utilized like petroleum products, there are differences between coal and petroleum such that they should be classified in different categories for taxation purposes. The legislature further finds that:

(a) coal is the only mineral which can supply energy while being easily found in abundance in Montana;

(b) coal is the only mineral which is so often marketed through sales contracts of many years' duration;

(c) coal, unlike most minerals, varies widely in composition and consequent value when marketed;

(d) coal in Montana is subject to regional and national demands for development which could affect the economy and environment of a larger portion of the state than any other mineral development has done;

(e) coal in Montana, when subbituminous and recoverable by strip mining, is in sufficient demand that

at least one-third of the price it commands at the mine may go to the economic rents of royalties and production taxes;

(f) coal in the lignite form is in less demand and producers of lignite are able to pay lesser amounts of royalty and production tax than producers of subbituminous can pay;

(g) coal produced in underground mines has higher production costs and underground producers are able to pay lesser amounts of royalty and production tax than strip-mine producers can pay;

(h) coal production in Montana has been subject to an uncoordinated array of taxes which overlap one another and yield revenue in an inconsistent and unpredictable manner.

(2) The legislature declares that the purposes of this chapter are to:

(a) allow the severance taxes on coal production to remain a constant percentage of the price of coal;

(b) stabilize the flow of tax revenue from coal mines to local governments through the property taxation system;

(c) simplify the structure of coal taxation in Montana, reducing tax overlap and improving the predictability of tax projections; and

(d) accomplish the foregoing purposes by establishing categories of taxation which recognize the unique character of coal as well as the variations found within the coal industry.

Montana Coal Severance Tax

15-35-102. Definitions. As used in this chapter, the following definitions apply:

(1) "Contract sales price" means either the price of coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by the seller to pay taxes paid on production, or a price imputed by the department under 15-35-107.

(2) "Department" means the department of revenue.

(3) "Energy conversion process" includes any process by which coal in the solid state is transformed into slurry, gas, electric energy, or any other form of energy.

(4) "Produced" means severed from the earth.

(5) "Strip mining" or "surface mining" is defined in 82-4-203.

(6) "Taxes paid on production" includes any tax paid to the federal, state, or local governments upon the quantity of coal produced as a function of either the volume or the value of production and does not include any tax upon the value of mining equipment, machinery, or buildings and lands, any tax upon a person's net income derived in whole or in part from the sale of coal, or any license fee.

(7) "Ton" means 2,000 pounds.

(8) "Underground mining" means a coal mining method utilizing shafts and tunnels and as further defined in 82-4-203.

Montana Coal Severance Tax

15-35-103. Severance tax—rates imposed—exemptions. (1) A severance tax is imposed on each ton of coal produced in the state in accordance with the following schedule:

Heating quality (Btu per pound of coal):	Surface Mining	Underground Mining
Under 7,000	12 cents or 20% of value	5 cents or 3% of value
7,000-8,000	22 cents or 30% of value	8 cents or 4% of value
8,000-9,000	34 cents or 30% of value	10 cents or 4% of value
Over 9,000	40 cents or 30% of value	12 cents or 4% of value

"Value" means the contract sales price.

(2) The formula which yields the greater amount of tax in a particular case shall be used at each point on this schedule.

(3) A person is not liable for any severance tax upon 20,000 tons of the coal he produces in a calendar year.

15-35-104. Quarterly statement and payment of tax. Each coal mine operator shall compute the severance tax due on each quarter-year's worth of production on forms prescribed by the department. The statement shall indicate the tonnage produced, the average Btu value of the production, the contract sales price received for the production, and such other information as the department may require. The completed form in duplicate,

with the tax payment, shall be delivered to the department not later than 30 days following the close of the quarter. The form shall be verified by an officer of the coal mine operator. A person operating more than one coal mine in this state may include all of his mines in one statement. The department may grant a reasonable extension of time for filing statements and payment of taxes due upon good cause shown therefor.

15-35-105. Penalty for delinquent tax. The department shall add to the amount of all delinquent severance taxes a penalty of 10% of the delinquent amount plus interest at the rate of 1% per month or fraction thereof computed on the total amount of severance tax and penalty. Interest shall be computed from the date the severance tax was due to the date of payment. The department shall mail to the person required to file a quarterly report and pay any severance tax, a letter setting forth the amount of tax, penalty, and interest due, and the letter shall further contain a statement that if payment is not made within 15 days, a lien may be filed as set forth in 15-23-704. The penalty amount may be waived by the department if reasonable cause for the failure or neglect to file the quarterly statement is provided to the department.

* * * * *

15-35-107. When value of coal may be imputed—procedure. (1) The department may impute a value to the coal which approximates market value f.o.b. mine in a case where:

(a) the operator of a coal mine is using the produced coal in an energy-conversion or other manufacturing process;

(b) a person sells coal under a contract which is not an arm's-length agreement; or

(c) a person neglects or refuses to file a statement and tax return under this chapter.

(2) When imputing value, the department may apply the factors used by the federal government under 26 U.S.C., section 613, or that provision as it may be labeled or amended, in determining gross income from mining or the department may apply any other or additional criteria it considers appropriate. Each subject taxpayer shall upon request by the department furnish a copy of its federal income tax return, with any amendments, filed for the year in which the value of coal is being imputed and copies of the contracts under which it is selling coal at the time. When the department's estimate of market value is contested in any proceeding, the burden of proof is on the contesting party.

15-35-108. Disposal of severance taxes. Severance taxes collected under the provisions of this chapter are allocated as follows:

(1) To the trust fund created by Article IX, section 5, of the Montana constitution, 25% of total collections a year. After December 31, 1979, 50% of coal severance tax collections are allocated to this trust fund. The trust fund moneys shall be deposited in the fund established under 17-6-203(5) and invested by the board of investments as provided by law.

(2) Coal severance tax collections remaining after allocation to the trust fund under subsection (1) are allocated in the following percentages of the remaining balance:

Montana Coal Severance Tax

(a) to the county in which coal is mined, 2% of the severance tax paid on the coal mined in that county until January 1, 1980, for such purposes as the governing body of the county may determine;

(b) 2½% until December 31, 1979, and thereafter 5% to the earmarked revenue fund to the credit of the alternative energy research development and demonstration account;

(c) 26½% until July 1, 1979, and thereafter 37½% to the earmarked revenue fund to the credit of the local impact and education trust fund account;

(d) for each of the 2 fiscal years following June 30, 1977, 13% to the earmarked revenue fund to the credit of the coal area highway improvement account;

(e) 10% to the earmarked revenue fund for state equalization aid to public schools of the state;

(f) 1% to the earmarked revenue fund to the credit of the county land planning account;

(g) 2½% to the sinking fund to the credit of the renewable resource development bond account;

(h) 5% to the earmarked revenue fund to the credit of a trust fund for the purpose of parks acquisition or management, protection of works of art in the state capitol, and other cultural and aesthetic projects. Income from this trust fund shall be appropriated as follows:

(i) ⅓ for protection of works of art in the state capitol and other cultural and aesthetic projects; and

(ii) ⅔ for the acquisition of sites and areas described in 23-1-102 and the operation and maintenance of sites so acquired;

(i) 1% to the earmarked revenue fund to the credit of the state library commission for the purposes of providing basic library services for the residents of all counties through library federations and for payment of the costs of participating in regional and national networking;

(j) all other revenues from severance taxes collected under the provisions of this chapter to the credit of the general fund of the state.

* * * * *

15-35-110. Penalties for neglect or false statement. A person who fails, neglects, or refuses to file any statement required under this chapter or who makes a false statement commits a misdemeanor. A person convicted under this section shall be fined not to exceed $1,000 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

15-35-111. Rulemaking authority. The department of revenue may adopt rules necessary for the taxation of property under this chapter.

CONSTITUTIONAL PROVISIONS

ARTICLE I, SECTION 8, CL. 3 OF THE UNITED STATES CONSTITUTION

Section 8. The Congress shall have Power * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *

ARTICLE VI, CL. 2 OF THE UNITED STATES CONSTITUTION

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

FEDERAL STATUTES

Note: The federal statutes on which appellants rely are voluminous. We reprint extracts which have particular pertinence to the issues raised by the Jurisdictional Statement.

The Clean Air Act of 1970, as amended, 42 U.S.C. 1857 et seq.[1] (excerpts)

TITLE I—AIR POLLUTION PREVENTION AND CONTROL

PART A—AIR QUALITY AND EMISSION LIMITATIONS

FINDINGS AND PURPOSES

Sec. 101. (a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

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1 Clean Air Act (42 U.S.C. 1857 et seq.) includes the Clean Air Act of 1963—P.L. 88-206, and amendments made by the Motor Vehicle Air Pollution Control Act—P.L. 89-272 (October 20, 1965), the Clean Air Act Amendments of 1966—P.L. 89-675 (October 15, 1966), the Air Quality Act of 1967—P.L. 90-148 (November 21, 1967), the Clean Air Amendments of 1970—P.L. 91-604 (December 31, 1970), the Comprehensive Health Manpower Training Act of 1971—P.L. 92-157 (November 18, 1971), the Energy Supply and Environmental Coordination Act of 1974—P.L. 93-319 (June 22, 1974), Clean Air Act Amendments of 1977—P.L. 95-95 (August 7, 1977), and Safe Drinking Water Act of 1977—P.L. 95-190 (November 16, 1977).

The Clean Air Act, as amended, 42 U.S.C. 1857 et seq. (excerpts)

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) The purposes of this title are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

The Clean Air Act, as amended, 42 U.S.C. 1857 et seq. (excerpts)

AIR QUALITY CRITERIA AND CONTROL TECHNIQUES

Sec. 108. (a)(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

The Clean Air Act, as amended, 42 U.S.C. 1857 et seq. (excerpts)

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b)(1) Simultaneously with the issuance of criteria under subsection (a), the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

* * * * *

STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

Sec. 111. (a) For purposes of this section:

(1) The term "standard of performance" means—

The Clean Air Act, as amended, 42 U.S.C. 1857 et seq. (excerpts)

(A) with respect to any air pollutant emitted from a category of fossil fuel fired stationary sources to which subsection (b) applies, a standard—

(i) establishing allowable emission limitations for such category of sources, and

(ii) requiring the achievement of a percentage reduction in the emissions from such category of sources from the emissions which would have resulted from the use of fuels which are not subject to treatment prior to combustion,

(B) with respect to any air pollutant emitted from a category of stationary sources (other than fossil fuel fired sources) to which subsection (b) applies, a standard such as that referred to in subparagraph (A)(i); and

(C) with respect to any air pollutant emitted from a particular source to which subsection (d) applies, a standard which the State (or the Administrator under the conditions specified in subsection (d)(2)) determines is applicable to that source and which reflects the degree of emission reduction achievable through the application of the best system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated for that category of sources.

The Clean Air Act, as amended, 42 U.S.C. 1857 et seq. (excerpts)

For the purpose of subparagraphs (A)(i) and (ii) and (B), a standard of performance shall reflect the degree of emission limitation and the percentage reduction achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. For the purpose of subparagraph (1)(A)(ii), any cleaning of the fuel or reduction in the pollution characteristics of the fuel after extraction and prior to combustion may be credited, as determined under regulations promulgated by the Administrator, to a source which burns such fuel.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

The Clean Air Act, as amended, 42 U.S.C. 1857 et seq. (excerpts)

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

(7) The term "technological system of continuous emission reduction" means—

(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 or any amendment thereto, or any subsequent enactment which supersedes such Act, or (B) which qualifies under section 113(d)(5)(A)(ii) of this Act, shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.

(b)(1)(A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air

pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every four years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(5) Except as otherwise authorized under subsection (h), nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or

modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A) (i) and (ii) shall be promulgated not later than one year after enactment of this paragraph. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed revised standards shall not be required to comply with such revised standards.

(c)(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d)(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 110 under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or 112(b)(1)(A) but (ii) to which a standard of

performance under subsection (b) would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 110(c) in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 113 and 114 with respect to an implementation plan. In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

* * * * *

Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 627 (excerpts)

An Act to authorize and require the President of the United States to allocate crude oil, residual fuel oil, and refined petroleum products to deal with existing or imminent shortages and dislocations in the national distribution system which jeopardize the public health, safety, or welfare; to provide for the delegation of authority; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

This Act may be cited as the "Emergency Petroleum Allocation Act of 1973".

FINDINGS AND PURPOSE

Sec. 2. (a) The Congress hereby determines that—

(1) shortages of crude oil, residual fuel oil, and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand, now exist or are imminent;

(2) such shortages have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop plantings and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods; and

(3) such hardships and dislocations jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized

most efficiently and effectively through prompt action by the Executive branch of Government.

(b) The purpose of this Act is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this Act shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

* * * * *

Energy Policy and Conservation Act of 1975, P.L. 94-163, 89 Stat. 871 (excerpts)

An Act to increase domestic energy supplies and availability; to restrain energy demand; to prepare for energy emergencies; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Energy Policy and Conservation Act".

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Sec. 103. Domestic use of energy supplies and related materials and equipment.

Sec. 104. Materials allocation.

Sec. 105. Prohibition of certain lease bidding arrangements.

* * * * *

Energy Policy and Conservation Act of 1975, P.L. 94-163, 89 Stat. 871 (excerpts)

STATEMENT OF PURPOSES

Sec. 2. The purposes of this Act are—

(1) to grant specific standby authority to the President, subject to congressional review, to impose rationing, to reduce demand for energy through the implementation of energy conservation plans, and to fulfill obligations of the United States under the international energy program;

(2) to provide for the creation of a Strategic Petroleum Reserve capable of reducing the impact of severe energy supply interruptions;

(3) to increase the supply of fossil fuels in the United States, through price incentives and production requirements;

(4) to conserve energy supplies through energy conservation programs, and, where necessary, the regulation of certain energy uses;

(5) to provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products;

(6) to reduce the demand for petroleum products and natural gas through programs designed to provide greater availability and use of this Nation's abundant coal resources; and

(7) to provide a means for verification of energy data to assure the reliability of energy data.

* * * * *

Energy Policy and Conservation Act of 1975, P.L. 94-163, 89 Stat. 871 (excerpts)

TITLE I—MATTERS RELATED TO DOMESTIC SUPPLY AVAILABILITY

PART A—DOMESTIC SUPPLY

COAL CONVERSION

Sec. 101. (a) Section 2(f) of the Energy Supply and Environmental Coordination Act of 1974 is amended—

(1) in paragraph (1) thereof, by striking out "June 30, 1975" and inserting in lieu thereof "June 30, 1977," and by striking out "January 1, 1979" and inserting in lieu thereof "January 1, 1985"; and

(2) in paragraph (2) thereof, by striking out "December 31, 1978" and inserting in lieu thereof "December 31, 1984," and by striking out "January 1, 1979" and inserting in lieu thereof "January 1, 1985."

(b) Section 2(a) of such Act is amended to read as follows:

"(a) The Federal Energy Administrator—

"(1) shall, by order, prohibit any powerplant, and

"(2) may, by order, prohibit any major fuel burning installation, other than a powerplant,

from burning natural gas or petroleum products as its primary energy source, if the requirements of subsection (b) are met and if (A) the Federal Energy Administrator determines such powerplant or installation on June 22, 1974, had, or thereafter acquires or is designed with, the

capability and necessary plant equipment to burn coal, or (B) such powerplant or installation is required to meet a design or construction requirement under subsection (c)."

(c) Section 2(c) of such Act is amended by inserting "or other major fuel burning installation" after "powerplant" wherever it appears and by inserting "in the case of a powerplant" after "(1)" in the second sentence.

* * * * *

Energy Reorganization Act of 1974, P.L. 93-438, 88 Stat. 1233 (excerpts)

An Act to reorganize and consolidate certain functions of the Federal Government in a new Energy Research and Development Administration and in a new Nuclear Regulatory Commission in order to promote more efficient management of such functions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

SHORT TITLE

Section 1. This Act may be cited as the "Energy Reorganization Act of 1974."

DECLARATION OF PURPOSE

Sec. 2. (a) The Congress hereby declares that the general welfare and the common defense and security require effective action to develop, and increase the efficiency and reliability of use of, all energy sources to meet the needs of present and future generations, to increase the productivity of the national economy and strengthen its position in regard to international trade, to make the Nation self-sufficient in energy, to advance the goals of restoring, protecting, and enhancing environmental quality, and to assure public health and safety.

(b) The Congress finds that, to best achieve these objectives, improve Government operations, and assure the coordinated and effective development of all energy sources, it is necessary to establish an Energy Research and Development Administration to bring together and direct Federal activities relating to research and development on the various sources of energy, to increase the

efficiency and reliability in the use of energy, and to carry out the performance of other functions, including but not limited to the Atomic Energy Commission's military and production activities and its general basic research activities. In establishing an Energy Research and Development Administration to achieve these objectives, the Congress intends that all possible sources of energy be developed consistent with warranted priorities.

(c) The Congress finds that it is in the public interest that the licensing and related regulatory functions of the Atomic Energy Commission be separated from the performance of the other functions of the Commission, and that this separation be effected in an orderly manner, pursuant to this Act, assuring adequacy of technical and other resources necessary for the performance of each.

(d) The Congress declares that it is in the public interest and the policy of Congress that small business concerns be given a reasonable opportunity to participate, insofar as is possible, fairly and equitably in grants, contracts, purchases, and other Federal activities relating to research, development, and demonstration of sources of energy efficiency, and utilization and conservation of energy. In carrying out this policy, to the extent practicable, the Administrator shall consult with the Administrator of the Small Business Administration.

(e) Determination of priorities which are warranted should be based on such considerations as power-related values of an energy source, preservation of material

resources, reduction of pollutants, export market potential (including reduction of imports), among others. On such a basis, energy sources warranting priority might include, but not be limited to, the various methods of utilizing solar energy.

TITLE I—ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION

ESTABLISHMENT

Sec. 101. There is hereby established an independent executive agency to be known as the Energy Research and Development Administration (hereinafter in this Act referred to as the "Administration").

* * * * *

RESPONSIBILITIES OF THE ADMINISTRATOR

Sec. 103. The responsibilities of the Administrator shall include, but not be limited to—

(1) exercising central responsibility for policy planning, coordination, support, and management of research and development programs respecting all energy sources, including assessing the requirements for research and development in regard to various energy sources in relation to near-term and long-range needs, policy planning in regard to meeting those requirements, undertaking programs for the optimal development of the various forms of energy sources, managing such programs, and disseminating information resulting therefrom;

Energy Reorganization Act of 1974, P.L. 93-438, 88 Stat. 1233 (excerpts)

(2) encouraging and conducting research and development, including demonstration of commercial feasibility and practical applications of the extraction, conversion, storage, transmission, and utilization phases related to the development and use of energy from fossil, nuclear, solar, geothermal, and other energy sources;

(3) engaging in and supporting environmental, biomedical, physical, and safety research related to the development of energy sources and utilization technologies;

(4) taking into account the existence, progress, and results of other public and private research and development activities, including those activities of the Federal Energy Administration relating to the development of energy resources using currently available technology in promoting increased utilization of energy resources, relevant to the Administration's mission in formulating its own research and development programs;

(5) participating in and supporting cooperative research and development projects which may involve contributions by public or private persons or agencies, of financial or other resources to the performance of the work;

(6) developing, collecting, distributing, and making available for distribution, scientific and technical information concerning the manufacture or development of energy and its efficient extraction, conversion, transmission, and utilization;

Energy Reorganization Act of 1974, P.L. 93-438, 88 Stat. 1233 (excerpts)

(7) creating and encouraging the development of general information to the public on all energy conservation technologies and energy sources as they become available for general use, and the Administrator, in conjunction with the Administrator of the Federal Energy Administration shall, to the extent practicable, disseminate such information through the use of mass communications;

(8) encouraging and conducting research and development in energy conservation, which shall be directed toward the goals of reducing total energy consumption to the maximum extent practicable, and toward maximum possible improvement in the efficiency of energy use. Development of new and improved conservation measures shall be conducted with the goal of the most expeditious possible application of these measures;

(9) encouraging and participating in international cooperation in energy and related environmental research and development;

(10) helping to assure an adequate supply of manpower for the accomplishment of energy research and development programs, by sponsoring and assisting in education and training activities in institutions of higher education, vocational schools, and other institutions, and by assuring the collection, analysis, and dissemination of necessary manpower supply and demand data;

(11) encouraging and conducting research and development in clean and renewable energy sources.

* * * * *

Energy Research and Development Administration Act, P.L. 95-39, 91 Stat. 180 (excerpts)

An Act to authorize appropriations to the Energy Research and Development Administration in accordance with section 261 of the Atomic Energy Act of 1954, as amended, section 305 of the Energy Reorganization Act of 1974, and section 16 of the Federal Nonnuclear Energy Research and Development Act of 1974, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress finds that the traditional energy sources of this country are being depleted and we must convert to other forms of energy. In addition, it may be necessary to undertake aggressive conservation programs to cut back on energy consumption and eliminate waste and reduce energy use. In spite of these efforts, Congress finds that domestic energy production in this country must approximately double by the end of this century, and must do so as our domestic sources of petroleum and natural gas decline. Therefore, it is essential that the policy of the Congress be established that every form of energy be put into use at the earliest possible moment, consistent with existing environmental laws, that new elements of energy production be placed on line as quickly as possible.

* * * * *

Energy Supply and Environmental Coordination Act of 1974, P.L. 93-319, 88 Stat. 246 (excerpts)

An Act to provide for means of dealing with energy shortages by requiring reports with respect to energy resources, by providing for temporary suspension of certain air pollution requirements, by providing for coal conversion, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

SECTION 1. SHORT TITLE; PURPOSE.

(a) This Act, including the following table of contents, may be cited as the "Energy Supply and Environmental Coordination Act of 1974."

* * * * *

(b) The purposes of this Act are (1) to provide for a means to assist in meeting the essential needs of the United States for fuels, in a manner which is consistent, to the fullest extent practicable, with existing national commitments to protect and improve the environment, and (2) to provide requirements for reports respecting energy resources.

SEC. 2. COAL CONVERSION AND ALLOCATION.

(a) The Federal Energy Administrator—

(1) shall, by order, prohibit any powerplant, and

(2) may, by order, prohibit any major fuel burning installation, other than a powerplant,

from burning natural gas or petroleum products as its primary energy source, if the Federal Energy Administra-

tor determines such powerplant or installation on the date of enactment of this Act has the capability and necessary plant equipment to burn coal, and if the requirements of subsection (b) are met.

* * * * *

Federal Coal Leasing Amendments Act of 1975, P.L. 94-377, 90 Stat. 1083 (excerpts)

An Act to amend the Mineral Leasing Act of 1920, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) this Act may be cited as the "Federal Coal Leasing Amendments Act of 1975."

(b) Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision of the Mineral Lands Leasing Act, the reference shall be considered to be made to a section or other provision of the Act of February 25, 1920, entitled "An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain" (41 Stat. 437).

Sec. 2. The first sentence of section 2(a) of the Mineral Lands Leasing Act (30 U.S.C. 201(a)) is amended to read as follows:

"(1) The Secretary of the Interior is authorized to divide any lands subject to this Act which have been classified for coal leasing into leasing tracts of such size as he finds appropriate and in the public interest and which will permit the mining of all coal which can be economically extracted in such tract and thereafter he shall, in his discretion, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands for leasing and shall award leases thereon by competitive bidding. No less than 50 per centum of the total acreage offered for lease by the Secretary in any one year shall be leased under a system of deferred

bonus payment. Upon default or cancellation of any coal lease for which bonus payments are due, any unpaid remainder of the bid shall be immediately payable to the United States. A reasonable number of leasing tracts shall be reserved and offered for lease in accordance with this section to public bodies, including Federal agencies, rural electric cooperatives, or nonprofit corporations controlled by any of such entities: *Provided,* That the coal so offered for lease shall be for use by such entity or entities for sale to their members or customers (except for short-term sales to others). No bid shall be accepted which is less than the fair market value, as determined by the Secretary, of the coal subject to the lease. Prior to his determination of the fair market value of the coal subject to the lease, the Secretary shall give opportunity for and consideration to public comments on the fair market value. Nothing in this section shall be construed to require the Secretary to make public his judgment as to the fair market value of the coal to be leased, or the comments he receives thereon prior to the issuance of the lease."

* * * * *

Sec. 6. Section 7 of the Mineral Lands Leasing Act (30 U.S.C. 207) is amended to read as follows:

"Sec. 7. (a) A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. Any lease which is not producing in commercial quantities at the end of ten years shall be terminated. The Secretary shall by regulation prescribe annual rentals on leases. A

lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12½ per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations. The lease shall include such other terms and conditions as the Secretary shall determine. Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

"(b) Each lease shall be subject to the conditions of diligent development and continued operation of the mine or mines, except where operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the lessee. The Secretary of the Interior, upon determining that the public interest will be served thereby, may suspend the condition of continued operation upon the payment of advance royalties. Such advance royalties shall be no less than the production royalty which would otherwise be paid and shall be computed on a fixed reserve to production ratio (determined by the Secretary). The aggregate number of years during the period of any lease for which advance royalties may be accepted in lieu of the condition of continued operation shall not exceed ten. The amount of any production royalty paid for any year shall be reduced (but not below 0) by the amount of any advance royalties paid under such lease to the extent that such advance royalties have not been used to reduce production royalties for a prior year. No advance royalty

paid during the initial twenty-year term of a lease shall be used to reduce a production royalty after the twentieth year of a lease. The Secretary may, upon six months' notification to the lessee cease to accept advance royalties in lieu of the requirement of continued operation. Nothing in this subsection shall be construed to affect the requirement contained in the second sentence of subsection (a) relating to commencement of production at the end of ten years.

"(c) Prior to taking any action on a leasehold which might cause a significant disturbance of the environment, and not later than three years after a lease is issued, the lessee shall submit for the Secretary's approval an operation and reclamation plan. The Secretary shall approve or disapprove the plan or require that it be modified. Where the land involved is under the surface jurisdiction of another Federal agency, that other agency must consent to the terms of such approval."

* * * * *

Sec. 9. (a) Section 35 of the Mineral Lands Leasing Act, as amended (30 U.S.C. 191) is further amended by deleting "52½ per centum thereof shall be paid into, reserved" and inserting in lieu thereof: "40 per centum thereof shall be paid into, reserved," and is further amended by striking the period at the end of the proviso and inserting in lieu thereof the following language: "*Provided further,* That an additional 12½ per centum of all moneys received from sales, bonuses, royalties, and rentals of public lands under the provisions of this Act and the Geothermal Steam Act of 1970 shall be paid

Federal Coal Leasing Amendments Act of 1975, P.L. 94-377, 90 Stat. 1083 (excerpts)

by the Secretary of the Treasury as soon as practicable after December 31 and June 30 of each year to the State within the boundaries of which the leased lands or deposits are or were located; said additional 12½ per centum of all moneys paid to any State on or after January 1, 1976, shall be used by such State and its subdivisions as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this Act for (1) planning, (2) construction and maintenance of public facilities, and (3) provision of public services:

* * * * *

Federal Nonnuclear Energy Research and Development Act of 1974, P.L. 93-577, 88 Stat. 1878 (excerpts)

An Act to establish a national program for research and development in nonnuclear energy sources.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

SHORT TITLE

Section 1. This Act may be cited as the "Federal Nonnuclear Energy Research and Development Act of 1974."

STATEMENT OF FINDINGS

Sec. 2. The Congress hereby finds that—

(a) The Nation is suffering from a shortage of environmentally acceptable forms of energy.

(b) Compounding this energy shortage is our past and present failure to formulate a comprehensive and aggressive research and development program designed to make available to American consumers our large domestic energy reserves including fossil fuels, nuclear fuels, geothermal resources, solar energy, and other forms of energy. This failure is partially because the unconventional energy technologies have not been judged to be economically competitive with traditional energy technologies.

(c) The urgency of the Nation's energy challenge will require commitments similar to those undertaken in the Manhattan and Apollo projects; it will require that the

Federal Nonnuclear Energy Research and Development Act of 1974, P.L. 93-577, 88 Stat. 1878 (excerpts)

Nation undertake a research, development, and demonstration program in nonnuclear energy technologies with a total Federal investment which may reach or exceed $20,000,000,000 over the next decade.

(d) In undertaking such program, full advantage must be taken of the existing technical and managerial expertise in the various energy fields within Federal agencies and particularly in the private sector.

(e) The Nation's future energy needs can be met if a national commitment is made now to dedicate the necessary financial resources, to enlist our scientific and technological capabilities, and to accord the proper priority to developing new nonnuclear energy options to serve national needs, conserve vital resources, and protect the environment.

STATEMENT OF POLICY

Sec. 3. (a) It is the policy of the Congress to develop on an urgent basis the technological capabilities to support the broadest range of energy policy options through conservation and use of domestic resources by socially and environmentally acceptable means.

(b)(1) The Congress declares the purpose of this Act to be to establish and vigorously conduct a comprehensive, national program of basic and applied research and development, including but not limited to demonstrations of practical applications, of all potentially beneficial energy sources and utilization technologies, within the Energy Research and Development Administration.

Federal Nonnuclear Energy Research and Development Act of 1974, P.L. 93-577, 88 Stat. 1878 (excerpts)

(2) In carrying out this program, the Administrator of the Energy Research and Development Administration (hereinafter in this Act referred to as the "Administrator") shall be governed by the terms of this Act and other applicable provisions of law with respect to all nonnuclear aspects of the research, development, and demonstration program; and the policies and provisions of the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.), and other provisions of law shall continue to apply to the nuclear research, development, and demonstration program.

(3) In implementing and conducting the research, development, and demonstration programs pursuant to this Act, the Administrator shall incorporate programs in specific nonnuclear technologies previously enacted into law, including those established by the Solar Heating and Cooling Act of 1974 (Public Law 93-409), the Geothermal Energy Research, Development, and Demonstration Act of 1974 (Public Law 93-410), and the Solar Energy Research, Development, and Demonstration Act of 1974 (Public Law 93-473).

* * * * *

Mineral Lands Leasing Act of 1920, Ch. 85, 41 Stat. 437 (excerpts)

Chap. 85—An Act To promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities: *Provided,* That the United States reserves the right to extract helium from all gas produced from lands permitted, leased, or otherwise granted under the provisions of this Act, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further,* That in the extraction of helium from gas produced from such lands, it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof: *And provided further,* That citizens of another country, the laws, customs, or regulations of which, deny similar or like privileges to citizens or corporations of this country,

shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act.

COAL

Sec. 2. That the Secretary of the Interior is authorized to, and upon the petition of any qualified applicant shall, divide any of the coal lands or the deposits of coal, classified and unclassified, owned by the United States, outside of the Territory of Alaska, into leasing tracts of forty acres each, or multiples thereof, and in such form as, in the opinion of the Secretary of the Interior, will permit the most economical mining of the coal in such tracts, but in no case exceeding two thousand five hundred and sixty acres in any one leasing tract, and thereafter the Secretary of the Interior shall, in his discretion, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands or deposits of coal for leasing, and shall award leases thereon by competitive bidding or by such other methods as he may by general regulations adopt, to any qualified applicant: *Provided,* That the Secretary is hereby authorized, in awarding leases for coal lands heretofore improved and occupied or claimed in good faith, to consider and recognize equitable rights of such occupants or claimants: *Provided further,* That where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area, the Secretary of the Interior may issue, to applicants qualified under this Act, prospecting permits for a term of two years, for not

exceeding two thousand five hundred and sixty acres; and if within said period of two years thereafter, the permittee shows to the Secretary that the land contains coal in commercial quantities, the permittee shall be entitled to a lease under this Act for all or part of the land in his permit: *And provided further,* That in no lease of coal under this Act shall be approved or issued until after notice of the proposed lease, or offering for lease, has been given for thirty days in a newspaper of general circulation in the county in which the lands or deposits are situated: *And provided further,* That no company or corporation operating a common carrier railroad shall be given or hold a permit or lease under the provisions of this Act for any coal deposits except for its own use for railroad purposes; and such limitations of use shall be expressed in all permits and leases issued to such companies or corporations, and no such company or corporation shall receive or hold more than one permit or lease for each two hundred miles of its railroad line within the State in which said property is situated, exclusive of spurs or switches and exclusive of branch lines built to connect the leased coal with the railroad, and also exclusive of parts of the railroad operated mainly by power produced otherwise than by steam: *And provided further,* That nothing herein shall preclude such a railroad of less than two hundred miles in length from securing and holding one permit or lease hereunder.

Sec. 3. That any person, association, or corporation holding a lease of coal lands or coal deposits under this Act may, with the approval of the Secretary of the

Interior, upon a finding by him that it will be for the advantage of the lessee and the United States, secure modifications of his or its original lease by including additional coal lands or coal deposits contiguous to those embraced in such lease, but in no event shall the total area embraced in such modified lease exceed in the aggregate two thousand five hundred and sixty acres.

Sec. 4. That upon satisfactory showing by any lessee to the Secretary of the Interior that all of the workable deposits of coal within a tract covered by his or its lease will be exhausted, worked out, or removed within three years thereafter, the Secretary of the Interior may, within his discretion, lease to such lessee an additional tract of land or coal deposits, which, including the coal area remaining in the existing lease, shall not exceed two thousand five hundred and sixty acres, through the same procedure and under the same conditions as in case of an original lease.

Sec. 5. That if, in the judgment of the Secretary of the Interior, the public interest will be subserved thereby, lessees holding under lease areas not exceeding the maximum permitted under this Act may consolidate their leases through the surrender of the original leases and the inclusion of such areas in a new lease of not to exceed two thousand five hundred and sixty acres of contiguous lands.

Sec. 6. That where coal or phosphate lands aggregating two thousand five hundred and sixty acres and subject to lease hereunder do not exist as contiguous areas, the Secretary of the Interior is authorized, if, in

his opinion the interests of the public and of the lessee will be thereby subserved, to embrace in a single lease noncontiguous tracts which can be operated as a single mine or unit.

Sec. 7. That for the privilege of mining or extracting the coal in the lands covered by the lease the lessee shall pay to the United States such royalties as may be specified in the lease, which shall be fixed in advance of offering the same, and which shall not be less than 5 cents per ton of two thousand pounds, due and payable at the end of each third month succeeding that of the extraction of the coal from the mine, and an annual rental, payable at the date of such lease and annually thereafter, on the lands or coal deposits covered by such lease, at such rate as may be fixed by the Secretary of the Interior prior to offering the same, which shall not be less than 25 cents per acre for the first year thereafter, not less than 50 cents per acre for the second, third, fourth, and fifth years, respectively, and not less than $1 per acre for each and every year thereafter during the continuance of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year. Leases shall be for indeterminate periods upon condition of diligent development and continued operation of the mine or mines, except when such operation shall be interrupted by strikes, the elements, or casualties not attributable to the lessee, and upon the further condition that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by

law at the time of the expiration of such periods: *Provided,* That the Secretary of the Interior may, if in his judgment the public interest will be subserved thereby, in lieu of the provision herein contained requiring continuous operation of the mine or mines, provide in the lease for the payment of an annual advance royalty upon a minimum number of tons of coal, which in no case shall aggregate less than the amount of rentals herein provided for: *Provided further,* That the Secretary of the Interior may permit suspension of operation under such lease for not to exceed six months at any one time when market conditions are such that the lease can not be operated except at a loss.

Sec. 8. That in order to provide for the supply of strictly local domestic needs for fuel, the Secretary of the Interior may, under such rules and regulations as he may prescribe in advance, issue limited licenses or permits to individuals or associations of individuals to prospect for, mine, and take for their use but not for sale, coal from the public lands without payment of royalty for the coal mined or the land occupied, on such conditions not inconsistent with this Act as in his opinion will safeguard the public interests: *Provided,* That this privilege shall not extend to any corporations: *Provided further,* That in the case of municipal corporations the Secretary of the Interior may issue such limited license or permit, for not to exceed three hundred and twenty acres for a municipality of less than one hundred thousand population, and not to exceed one thousand two hundred and eighty acres for a municipality of not less than one hundred thousand and not more than one hundred and

Mineral Lands Leasing Act of 1920,
Ch. 85, 41 Stat. 437 (excerpts)

fifty thousand population; and not to exceed two thousand five hundred and sixty acres for a municipality of one hundred and fifty thousand population or more, the land to be selected within the State wherein the municipal applicant may be located, upon condition that such municipal corporations will mine the coal therein under proper conditions and dispose of the same without profit to residents of such municipality for household use: *And provided further,* That the acquisition or holding of a lease under the preceding sections of this Act shall be no bar to the holding of such tract or operation of such mine under said limited license.

* * * * *

Sec. 35. That 10 per centum of all money received from sales, bonuses, royalties, and rentals under the provisions of this Act, excepting those from Alaska, shall be paid into the Treasury of the United States and credited to miscellaneous receipts; for past production 70 per centum, and for future production 52½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress, known as the Reclamation Act, approved June 17, 1902, and for past production 20 per centum, and for future production 37½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the State within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the construction and maintenance of public

roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct: *Provided,* That all moneys which may accrue to the United States under the provisions of this Act from lands within the naval petroleum reserves shall be deposited in the Treasury as "Miscellaneous receipts."

* * * * *

Natural Gas Policy Act of 1978,
P.L. 95-621, 92 Stat. 3350 (excerpts)

TITLE I—WELLHEAD PRICING

Subtitle A—Wellhead Price Controls

Sec. 102. CEILING PRICE FOR NEW NATURAL GAS AND CERTAIN NATURAL GAS PRODUCED FROM THE OUTER CONTINENTAL SHELF.

(a) APPLICATION.—The maximum lawful price computed under subsection (b) shall apply to any first sale of natural gas delivered during any month in the case of—

(1) new natural gas; and

(2) natural gas produced from any old lease on the Outer Continental Shelf and qualifying under subsection (d) for the new natural gas ceiling price.

(b) MAXIMUM LAWFUL PRICE.—The maximum lawful price under this section for any month shall be—

(1) $1.75 per million Btu's, in case of April 1977; and

(2) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subsection for the preceding month multiplied by the monthly equivalent factor equal to the sum of—

(A) the annual inflation adjustment factor applicable for such month; plus

(B)(i) .035, in the case of any month beginning before April 20, 1981; or

Natural Gas Policy Act of 1978,
P.L. 95-621, 92 Stat. 3350 (excerpts)

(ii) .04, in the case of any month beginning after April 20, 1981.

* * * * *

Subtitle B—Decontrol of Certain Natural Gas Prices

Sec. 121. ELIMINATION OF PRICE CONTROLS FOR CERTAIN NATURAL GAS SALES.

(a) GENERAL RULE. Subject to the reimposition of price controls as provided in section 122, the provisions of subtitle A respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall, except as provided in subsections (d) and (e), cease to apply effective January 1, 1985:

(1) NEW NATURAL GAS.—New natural gas (as defined in section 102(c)).

(2) NEW, ONSHORE PRODUCTION WELLS. —Natural gas produced from any new, onshore production well (as defined in section 103(c)), if such natural gas—

(A) was not committed or dedicated to interstate commerce on April 20, 1977; and

(B) is produced from a completion location which is located at a depth of more than 5,000 feet.

(3) INTRASTATE CONTRACTS IN EXCESS OF $1.00.—Natural gas sold under an existing contract, any successor to an existing contract, or any rollover contract, if—

(A) such natural gas was not committed or dedicated to interstate commerce on the day before the date of the enactment of this Act; and

(B) the price paid for the last deliveries of such natural gas occurring on December 31, 1984, or, if no deliveries occurred on such date, the price would have been paid had deliveries occurred on such date is higher than $1.00 per million Btu's.

(b) HIGH-COST NATURAL GAS.—Effective beginning on the effective date of the incremental pricing rule required under section 201, the provisions of subtitle A respecting the maximum lawful price for the first sale of natural gas shall cease to apply to the first sale of high-cost natural gas which is described in section 107(c)(1), (2), (3), or (4).

(c) NATURAL GAS PRODUCED FROM 5,000 OR LESS.—Effective beginning July 1, 1987, or, if later, the date of expiration of any price controls reimposed under section 122, the provisions of subtitle A respecting the maximum lawful price for any first sale of natural gas shall, except as provided in subsection (d), cease to apply to any first sale of natural gas produced from any new, onshore production well (as defined in section 103(c)), if such natural gas—

(1) was not committed or dedicated to interstate commerce on April 20, 1977; and

(2) is produced from a completion location which is located at a depth of 5,000 feet or less.

Natural Gas Policy Act of 1978,
P.L. 95-621, 92 Stat. 3350 (excerpts)

(d) EXCLUSION OF CERTAIN ALASKA NATURAL GAS.—The provisions of subsections (a) and (c) shall not apply to any natural gas produced from the Prudhoe Bay Unit of Alaska and transported through the natural gas transportation system approved under the Alaska Natural Gas Transportation Act of 1976.

(e) LIMITATION ON INDEFINITE PRICE ESCALATORS.—Natural gas which is not subject to maximum lawful prices under subtitle A solely by reason of subsection (a)(3) and which is sold under any existing contract or successor to an existing contract at a price established under an indefinite price escalator clause (as defined in section 105(b)(3)(B)) shall be subject to the provisions of section 105(b)(3).

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Powerplant and Industrial Fuel Use Act of 1978
P.L. 95-620,92 Stat. 3289 (excerpts)

TITLE I—GENERAL PROVISIONS

SEC. 102. FINDINGS; STATEMENT OF PURPOSES.

(a) FINDINGS.—The Congress finds that—

(1) the protection of public health and welfare, the preservation of national security, and the regulation of interstate commerce require the establishment of a program for the expended use, consistent with applicable environmental requirements, of coal and other alternate fuels as primary energy sources for existing and new electric powerplants and major fuel-burning installations; and

(2) the purposes of this Act are furthered in cases in which coal or other alternate fuels are used by electric powerplants and major fuel-burning installations, consistent with applicable environmental requirements, as primary energy souces in lieu of natural gas or petroleum.

(b) STATEMENT OF PURPOSES.—The purpose of this Act, which shall be carried out in a manner consistent with applicable environmental requirements, are—

(1) to reduce the importation of petroleum and increase the Nation's capability to use indigenous energy resources of the United States to the extent such reduction and use further the goal of national energy self-sufficiency and otherwise are in the best interests of the United States;

(2) to conserve natural gas and petroleum for uses, other than electric utility or other industrial or commercial generation of steam or electricity, for which there are no feasible alternative fuels or raw material substitutes;

(3) to encourage and foster the greater use of coal and other alternative fuels, in lieu of natural gas and petroleum, as a primary energy source;

(4) to the extent permitted by this Act, to encourage the use of synthetic gas derived from coal or other alternate fuels;

(5) to encourage the rehabilitation and upgrading of railroad service and equipment necessary to transport coal to regions of States which can use coal in greater quantities;

(6) to prohibit or, as appropriate, minimize the use of natural gas and petroleum as a primary energy source and to conserve such gas and petroleum for the benefit of present future generations;

(7) to encourage the modernization or replacement of existing and new electric powerplants and major fuel-burning installations which utilize natural gas or petroleum as a primary energy source and which cannot utilize coal or other alternate fuels where to do so furthers the conservation of natural gas and petroleum;

(8) to require that existing and new electric powerplants and major fuel-burning installations

which utilize natural gas, petroleum, or coal or other alternate fuels pursuant to this Act comply with applicable environmental requirements;

(9) to insure that all Federal agencies utilize their authorities fully in furtherance of the purposes of this Act by carrying out programs designed to prohibit or discourage the use of natural gas and petroleum as a primary energy source and by taking such actions as lie within their authorities to maximize the efficient use of energy and conserve natural gas and petroleum in programs funded or carried out by such agencies;

(10) to insure that adequate supplies of natural gas are available for essential agricultural uses (including crop drying, seed drying, irrigation, fertilizer production, and production of essential fertilizer ingredients for such uses);

(11) to reduce the vulnerability of the United States to energy supply interruptions; and

(12) to regulate interstate commerce.

SEC. 103. DEFINITIONS.

(a) Unless otherwise expressly provided, for the purposes of this Act—

* * * * *

(5) The term "coal" means anthracite and bituminous coal, lignite, and any fuel derivative thereof.

(6) The term "alternate fuel" means electricity or any fuel, other than natural gas or petroleum, and includes—

Powerplant and Industrial Fuel Use Act of 1978
P.L. 95-620,92 Stat. 3289 (excerpts)

(A) petroleum coke, shale oil, uranium, biomass, and municipal, industrial, or agricultural wastes, wood, and renewable and geothermal energy sources;

(B) liquid, solid, or gaseous waste byproducts of refinery or industrial operations which are commercially unmarketable, either by reason of quality or quantity, as determined under rules prescribed by the Secretary; and

(C) waste gases from industrial operations.

(7)(A) The terms "electric powerplant" and "powerplant" mean any stationary electric generating unit, consisting of a boiler, a gas turbine, or a combined cycle unit, which produces electric power for purposes of sale or exchange and—

(i) has the design capability of consuming any fuel (or mixture thereof) at a fuel heat input rate of 100 million Btu's per hour or greater; or

(ii) is in a combination of two or more electric generating units which are located at the same site and which in the aggregate have a design capability of consuming any fuel (or mixture thereof) at a fuel heat input rate of 250 million Btu's per hour or greater.

(B) For purposes of subparagraph (A), the term "electric generating unit" does not include—

(i) any electric generating unit subject to the licensing jurisdiction of the Nuclear Regulatory Commission; and

(ii) any cogeneration facility, less than half of the annual electric power generation of which is sold or exchanged for resale, as determined by the Secretary.

(C) For purposes of clause (ii) of subparagraph (A), there shall be excluded any unit which has a design capability to consume any fuel (including any mixture thereof) that does not equal or exceed 100 million Btu's per hour and the exclusion of which for purposes of such clause is determined by the Secretary, by rule, to be appropriate.

(8) The term "new electric powerplant" means—

(A) any electric powerplant for which construction or acquisition began on a date on or after the date of enactment of this Act; and

(B) any electric powerplant for which construction or acquisition began on a date after April 20, 1977, and before the date of the enactment of this Act, unless the Secretary finds the construction or acquisition of such powerplant could not be canceled, rescheduled, or modified to comply with the applicable requirements of this Act without—

(i) adversely affecting electric system reliability (as determined by the Secretary after consultation with the Federal Energy Regulatory Commission and the appropriate State authority), or

(ii) imposing substantial financial penalty (as determined under rules prescribed by the Secretary).

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P.L. 95-620,92 Stat. 3289 (excerpts)

(9)(A) The term "existing electric powerplant" means any electric powerplant other than a new electric powerplant.

(B) Any powerplant treated under this Act as an existing electric powerplant shall not be treated thereafter as a new electric powerplant merely by reason of a transfer of ownership.

(10)(A) The terms "major fuel-burning installation" and "installation" means a stationary unit consisting of a boiler, gas turbine unit, combined cycle unit, or internal combustion engine which—

(i) has a design capability of consuming any fuel (or mixture thereof) at a fuel heat input rate of 100 million Btu's per hour or greater; or

(ii) is in combination of two or more such units which are located at the same site and which in the aggregate have a design capability of consuming any fuel (or mixture thereof) at a fuel heat input rate of 250 million Btu's per hour or greater.

(B) The terms "major fuel-burning installation" and "installation" do not include—

(i) any electric powerplant; or

(ii) any pump or compressor used solely in connection with the production, gathering, transmission, storage, or distribution of gases or liquids, but only if there is certification to the Secretary of such use (in accordance with rules prescribed by the Secretary).

Powerplant and Industrial Fuel Use Act of 1978
P.L. 95-620,92 Stat. 3289 (excerpts)

(C) For purposes of clause (ii) of subparagraph (A), there shall be excluded any unit which has a design capability to consume any fuel (including any mixture thereof) that does not equal or exceed 100 million Btu's per hour and the exclusion of which for purposes of such clause is determined by the Secretary, by rule to be appropriate.

(11) The term "new major fuel-burning installation" means—

(A) any major fuel-burning installation on which construction or acquisition began on a date on or after the date of the enactment of this Act; and

(B) any major fuel-burning installation on which construction or acquisition began on a date after April 20, 1977, and before the date of the enactment of this Act, unless the Secretary finds the construction or acquisition of such installation could not be canceled, rescheduled, or modified to comply with applicable requirements of this Act without—

(i) incurring significant operational detriment of the unit (as determined by the Secretary); or

(ii) imposing substantial financial penalty (as determined under rules prescribed by the Secretary).

(12)(A) The term "existing major fuel-burning installation" means any installation which is not a new major fuel-burning installation.

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(B) Such term does not include a major fuel-burning installation for the extraction of mineral resources located—

(i) on or above the Continental Shelf of the United States,

or

(ii) on wetlands areas adjacent to the Continental Shelf of the United States,

where coal storage is not practicable or would produce adverse effects on environmental quality.

(C) Any installation treated as an existing major fuel-burning installation shall not be treated thereafter as a new major fuel-burning installation merely by reason of a transfer of ownership.

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TITLE II—NEW FACILITIES
Subtitle A—Prohibitions

SEC. 201. NEW ELECTRIC POWERPLANTS.

Except to such extent as may be authorized under subtitle B—

(1) natural gas or petroleum shall not be used as a primary energy source in any new electric powerplant; and

(2) no new electric powerplant may be constructed without the capability to use coal or any other alternate fuel as a primary energy source.

Powerplant and Industrial Fuel Use Act of 1978
P.L. 95-620,92 Stat. 3289 (excerpts)

SEC. 202. NEW MAJOR FUEL-BURNING INSTALLATIONS.

(a) GENERAL PROHIBITION.—Except to such extent as may be authorized under subtitle B, natural gas or petroleum shall not be used as a primary energy source in a new major fuel-burning installation consisting of a boiler.

(b) AUTHORITY OF SECRETARY TO PROHIBIT NONBOILERS FROM USING NATURAL GAS OR PETROLEUM.—(1) The Secretary may, by rule, prescribe categories (identified in such rules) of new major fuel-burning installations, other than boilers, in which natural gas or petroleum, or both, shall be prohibited from being used as a primary energy source. In identifying categories of new major fuel-burning installations pursuant to this paragraph, the Secretary shall take into account any special circumstances or characteristics of each category of such installations (such as the technical feasibility of burning coal or other alternate fuels and the size or geographic location of such installations). The application of any such final rule in the case of any new major fuel-burning installation subject to such rule shall be stayed pending a resolution (including judicial review) of any petition for an exemption for such installation which is filed with the Secretary not later than 60 days after such final rule is published under section 702(a). Any such final rule shall not apply in the case of any installation with respect to which a comparable prohibition was issued by order (or was proposed but was not issued because it was

demonstrated that it could qualify for an exemption under subtitle B).

(2)(A) The Secretary may, by order, prohibit the use of natural gas or petroleum, or both, as a primary energy source in any new major fuel-burning installation, other than a boiler, if such installation is not, at the time of the issuance of the proposed order, in a category identified in a final rule issued under paragraph (1).

(B) Subject to subparagraph (C), the Secretary shall not issue a final order under this paragraph with respect to any installation if it is demonstrated that there would have been granted an exemption for such installation if such prohibition had been established by rule pursuant to paragraph (1) rather than by order pursuant to this paragraph, except that if a temporary exemption would have been granted, such a final order may be issued but may not take effect until such time as such temporary exemption would have terminated.

(C) In any case in which an order is not issued by reason of subparagraph (B) or in which the effective date of such order is delayed under subparagraph (B), the Secretary shall take such steps as may be necessary to assure the installation involved complies with the same requirements (including provisions of section 214(a)) as would have been applicable if an exemption had been granted based upon the grounds for which the order is not issued or the effective date of which is delayed.

(3) A prohibition under this subsection shall only apply with respect to an installation for which construc-

tion or acquisition began on or after the date of the publication under section 701(b) of the proposed rule or order establishing the prohibition. Any installation not subject to such a prohibition because of the preceding sentence shall be considered an existing major fuel-burning installation for purposes of title III.

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TITLE III—EXISTING FACILITIES
SUBTITLE A—PROHIBITIONS

SEC. 301. EXISTING ELECTRIC POWERPLANTS.

(a) GENERAL PROHIBITIONS.—Except to such extent as may be authorized under subtitle B—

(1) natural gas shall not be used as a primary energy source in an existing electric powerplant on or after January 1, 1990;

(2) natural gas shall not be used as a primary energy source in an existing electric powerplant before January 1, 1990, unless such powerplant used natural gas as a primary energy source at any time during calendar year 1977; and

(3) natural gas shall not be used as a primary energy source in an existing electric powerplant in any calendar year before 1990 in greater proportions than the average yearly proportion of natural gas which—

(A) such powerplant used as a primary energy source in calendar years 1974 through 1976, or

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(B) if such powerplant began operations on or after January 1, 1974, such powerplant used as a primary energy source during the first two calendar years of its operation.

The prohibition of paragraph (1) shall be stayed with respect to any existing powerplant pending a resolution (including judicial review) of any petition for any exemption from such prohibition which is filed for such powerplant at any time after the effective date of this Act, but at least one year before the date such prohibition first takes effect.

(b) AUTHORITY OF SECRETARY TO PROHIBIT WHERE COAL OR ALTERNATE FUEL CAPABILITY EXISTS.—The Secretary may prohibit, in accordance with section 303(a) or (b), the use of petroleum or natural gas, or both, as a primary energy source in any existing electric powerplant, if the Secretary finds that—

(1) such powerplant has or previously had the technical capability to use coal or another alternate fuel as a primary energy source;

(2) such powerplant has the technical capability to use coal or another alternate fuel as a primary energy source, or it could have such capability without—

(A) substantial physical modification of the powerplant, or

(B) substantial reduction in the rated capacity of the powerplant; and

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(3) it is financially feasible to use coal or another alternate fuel as a primary energy source in such powerplant.

The requirement of paragraph (1) shall not be considered to be satisfied unless the finding under such paragraph is made before the date of the publication of the notice of proposed prohibition under section 701(b) and is published with such notice.

(c) AUTHORITY OF SECRETARY TO PROHIBIT EXCESSIVE USE IN MIXTURES.—In the case of any existing electric powerplant in which the Secretary finds it is technically and financially feasible to use a mixture of petroleum or natural gas and coal or an alternate fuel as a primary energy source, the Secretary may prohibit, in accordance with section 303(a), the use of petroleum or natural gas, or both, in such powerplant in amounts in excess of the minimum amount necessary to maintain reliability of operation of the unit consistent with maintaining reasonable fuel efficiency of such mixture.

SEC. 302. EXISTING MAJOR FUEL-BURNING INSTALLATIONS.

(a) AUTHORITY OF SECRETARY TO PROHIBIT WHERE COAL OR ALTERNATE FUEL CAPABILITY EXISTS.—The Secretary may prohibit, in accordance with section 303(a) or (b), the use of petroleum or natural gas, or both, as a primary energy source in any existing major fuel-burning installation, if the Secretary finds that—

(1) such installation has or previously had the technical capability to use coal or another alternate fuel as a primary energy source;

(2) such installation has the technical capability to use coal or another alternate fuel as a primary energy source, or it could have such capability without—

(A) substantial physical modification of the unit, or

(B) substantial reduction in the rated capacity of the unit; and

(3) it is financially feasible to use coal or another alternate fuel as a primary energy source in such installation.

The requirement of paragraph (1) shall not be considered to be satisfied unless the finding under such paragraph is made before the date of the publication of the notice of proposed prohibition under section 701(b) and is published with such notice.

(b) AUTHORITY OF SECRETARY TO PROHIBIT EXCESSIVE USE IN MIXTURES.—

(1) In the case of any existing major fuel-burning installation in which the Secretary finds it is technically and financially feasible to use a mixture of petroleum or natural gas and coal or another alternate fuel as a primary energy source the Secretary may prohibit, in accordance with section 303(a), the use of petroleum or natural gas, or both, in such installation in amounts in excess of the minimum percentage of the total Btu

heat input of the primary energy sources needed to maintain reliability of operation of the unit consistent with maintaining reasonable fuel efficiency of such mixture.

(2) The percentage determined by the Secretary under paragraph (1) shall not be less than 25 percent.

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